163 U S 675
994 & 995.

Office Supreme Court U. S.
FILED
MAY 4 18
JAMES H. McKENNEY,
CLERK

The Supreme Court of the United States.

163—675

THE AMERICAN WATER WORKS COMPANY, a corporation organized and existing under the Laws of the State of Illinois, the American Water Works Company, a corporation organized and existing under the Laws of the State of New Jersey, and Alonzo B. Hunt, temporary Receiver of the American Water Works Company of New Jersey,

Petitioners for Certiorari,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,

Defendant.

THADDEUS S. CLARKSON, Receiver of the American Water Works Company, a corporation of the State of Illinois,

Petitioner for Certiorari,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,

Defendant.

BRIEF FOR THE FARMERS' LOAN AND TRUST COMPANY UPON PETITION FOR WRIT OF CERTIORARI.

DAVID McCLURE,

Of Counsel for

THE FARMERS' LOAN AND TRUST COMPANY,

22 William Street, New York

IN THE

Supreme Court of the United States

THE AMERICAN WORKS COMPANY, a corporation organized and existing under the Laws of the State of Illinois, the American Water Works Company, a corporation organized and existing under the Laws of the State of New Jersey, and Alonzo B. Hunt, temporary Receiver of the American Water Works Company of New Jersey,

Petitioners for Certiorari,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,

Defendant.

THADDEUS S. CLARKSON, Receiver of the American Water Works Company, a corporation of the State of Illinois,

Petitioner for Certiorari,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,

Defendant.

In the Matter of the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The petitioners file their petition for a writ of

certiorari under the Act of Congress to enable this Court to review the questions decided by the courts below on the grounds set forth in their petition.

The Court will find, upon examining the record in the case, that the action is brought to foreclose a mortgage and a supplemental mortgage made by the American Water Works Company, an Illinois corporation, to the Farmers' Loan and Trust Company, to secure an issue of $4,000,000 of Bonds, $3,600,000 of which are outstanding. The parties named in the bill of complaint, are The Farmers' Loan and Trust Company, complainant, a corporation organized under the laws of the State of New York, and the American Water Works Company, an Illinois corporation, the American Water Works Company, a new Jersey corporation, E. Hyde Rust, as suspended Receiver of the American Water Works Company, a citizen of the State of New Jersey, and Alonzo B. Hunt, temporary Receiver of the American Water Works Company, a citizen of the State of Nebraska.

Before the commencement of the foreclosure suit mentioned, the property covered by the mortgages which said suit sought to foreclose, had been placed in the hands of receivers by an order of the Circuit Court of the United States for the District of Nebraska, in an action therein pending between the parties plaintiff and defendant to which suit there existed the necessary diversity of citizenship to give the Court jurisdiction (Paragraph XX *b* of the Bill of Complaint). The petitioner, Hunt, is the Receiver appointed in this prior suit.

It appears from the record herein that both of the American Water Works corporations are dissolved, and although they appear nominally as parties to this proceeding, it is only nominally, as there are now no such corporations in existence. E. Hyde Rust, appointed by the Court of Chancery in New Jersey, and Alonzo B. Hunt, appointed by the Circuit Court of the United States for the District of Nebraska, are the receivers of the New

Jersey corporation. The petitioner Clarkson, is the ancillary Receiver of the Illinois corporation and was appointed by the Circuit Court of the United States for the District of Nebraska.

A statement of the facts in the case is contained in the brief used by the complainant before the Circuit Court of Appeals, a copy of which is hereto annexed and made a part hereof.

POINTS.

I. The first reason assigned by petitioners for the writ presents questions which have been finally and conclusively determined by this Court contrary to the position of the petitioners. These questions were not presented to the Circuit Court of Appeals for review.

The property being at the time of the commencement of the foreclosure suit in the possession of receivers appointed by the United States Circuit Court for the District of Nebraska, the complainant was compelled to go into that Court to foreclose its mortgages, and the possession of the Court drew to it jurisdiction of all matters relating to the administration of the property on its part and the establishment and enforcement of liens thereon. This Court has repeatedly passed upon this question and settled the doctrine, that where the property is in the possession of the United States Court, the jurisdiction of suits affecting that property does not rest upon the diversity of citizenship nor residence of the parties, but upon the ground of the Court's possession.

Referring to one or two of the more recent causes we would cite, in the first place, *Morgan's Co. vs. Texas Central R'way Co.*(137 U. S., 201), where the Court says:

"The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that Court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control." *Minnesota Co.* vs. *St. Paul Co.*, 2 Wall., 609; *People's Bank* vs. *Calhoun*, 102 U. S., 256; *Krippendorf* vs. *Hyde*, 110 U. S., 276.

And in the very recent case of *Carey* vs. *Houston & Texas Ry. Co.* (161 U. S., 133), the Court says:

"Certainly, possession under one or the other of these bills (under which Receivers had been appointed of the property in question) drew to the Court the right to decide upon the conflicting claims to the ultimate possession and control of the property, to marshal all liens upon it, and to enforce them" (citing the case of the *Morgan Co.* vs. *Texas Central*).

Independently, however, of the fact that the property was in the possession of Receivers of the United States Court at the time the foreclosure bill was filed, the Circuit Court of the United States for the District of Nebraska, within whose territorial jurisdiction the property affected by the mortgage was situated, had jurisdiction to entertain the suit in question, and, although none of the defendants resided within the District of Nebraska, the jurisdiction of the Court could still be maintained. The citizenship of complainant is different from that of all the other parties. Alonzo B. Hunt, one of the defendants, did reside in Nebraska, and, as Receiver, had actual possession of the *res* at the time the suit was begun, and so was a necessary party.

Under the clause of the Judiciary Act of 1887, which provides that "nothing in this act shall be held, deemed, or construed to repeal or affect any of the jurisdictional rights * * mentioned in section 8 of the act of which this act is an amendment," an action affecting specific real property within the jurisdiction of a Circuit Court may be maintained where the necessary diversity of citizenship appears,

without reference to the residence within the district of the parties.

See *Ames* vs. *Holderbaum* (42 Fed. Rep., 341); *Single* vs. *Scott Paper Co.* (55 Fed. Rep., 553); *Spencer* vs. *Kansas City Stockyards Co.* (56 Fed. Rep., 741).

But further, in reference to the first reason assigned for the writ of certiorari, we would call the Court's attention to the fact that this reason is not included among the assignment of errors to the Circuit Court of Appeals upon which it was sought to reverse the decree of the Circuit Court. The question was presented to the Circuit Court by a plea to the jurisdiction (page 66 of the Record in the Circuit Court of Appeals), and after argument the plea was overruled (page 68).

II.—The petitioners in this case have no standing to deny the validity of the mortgages.

It appears from the evidence in this case that the mortgages foreclosed were made by the American Water Works Company, an Illinois corporation, and that subsequently the property covered by the mortgages was conveyed to the American Water Works Company, a New Jersey corporation, and the deed was made expressly subject to the mortgages. (See Deed, Exhibit H, pp. 235, 237 of Record). The Illinois corporation and its receiver, therefore, have no longer any interest in the property covered by the mortgages, and the New Jersey corporation and its receiver are estopped by the recitals in the deed to the New Jersey Company to deny the validity of the mortgages and the bonds issued thereunder. This question is discussed at Point III. of the brief hereto annexed, and also in the opinion of the Circuit Court of Appeals.

Moreover, the original mortgage foreclosed herein re-

cites among other things that, "THE SAID AMERICAN WATER WORKS COMPANY IS AUTHORIZED BY LAW TO CONTRACT DEBTS AND BORROW MONEY WITHOUT LIMIT" (p. 21). In the face of such a representation contained in the mortgage, no Court would relieve a corporation from its obligation to pay the bonds which had been purchased upon the strength of the recitals contained in the mortgage.

III.—The remaining reasons assigned for the writ of certiorari do not present questions of sufficient gravity and importance for the Supreme Court of the United States to require the Circuit Court of Appeals to certify this case to it for review.

This Court has already declared that it would only exercise this branch of its jurisdiction sparingly and with great caution, and never excepting in cases of gravity and importance. In the case of *Lau Ow Bew, Petitioner*, 141 U. S., 583, the Court, speaking through Mr. Chief Justice FULLER, says:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment before the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this Court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

The second and third reasons assigned raise questions of fact as to the provisions of the laws of the State of

Nebraska and of the State of Illinois. The Farmers' Loan and Trust Company denies the statements of law as therein contained, and respectfully refers to the Brief in the Circuit Court of Appeals where these questions are discussed. (See Points I and II.) The statutes of Illinois under which the mortgagor company was incorporated, did authorize it to mortgage its property without limit, and it came into Nebraska with this power and without any law forbidding its exercise in the latter State. The Farmers' Loan and Trust Company insists, however, that the matters therein mentioned are of no general importance, as the questions involved relate purely to local law. The United States Circuit Court sitting in Nebraska has passed upon these questions and the Circuit Court of Appeals has affirmed the decision of that Court. The consideration of these questions will be found in the Opinion of the Circuit Court of Appeals which is annexed to this brief.

In reference to the fourth reason assigned by the petitioners, the Farmers' Loan and Trust Company, denies the statements therein made as to the facts. This question will also be found discussed in our brief, but the Farmers' Loan and Trust Company respectfully submits that the questions herein raised are purely questions of fact and present no questions of law to the Court. We do not believe that this Court will *certiorari* a case to review simply a question of fact. Besides the grounds alleged cannot be raised by petitioners, when the State or city objects to the bonds and mortgages, it will be time enough to consider the matter.

In reference to the fifth reason assigned, this question is discussed in the brief which we have annexed hereto in Points numbered I and II. Under these points we show that the corporation was authorized to make the mortgages in question. This, again, presents largely a question of fact and of local law.

In reference to reason 6, we have already referred to the recital in the mortgage stating that the American

Water Works Company had power to contract debts and to borrow money without limit, so that not only does the mortgage in question not contain a notice of the lack of authority on the part of the water company to make the mortgage in question, but, on the contrary, contains an affirmative allegation of its authority to execute the mortgage.

The seventh reason assigned is not a matter of sufficient gravity or importance to warant this Court in issuing the writ. It raises a question of fact which the Circuit Court of Appeals discussed in its opinion. As a matter of fact, there is evidence in the record to show that the holders of the bonds were holders for value. This subject will be found discussed under Point V of the brief hereto annexed.

In reference to reason 8, we would suggest that it states a conclusion of law which is incorrect. At the same time we would urge that there is no company today with whom the City of Omaha has any subsisting contract by which it can compel the performance of a public duty. Both the original American Water Works Company of Illinois and the American Water Works Company of New Jersey have been dissolved and are in the hands of Receivers. The property is bound to be sold sooner or later, if not under the mortgages foreclosed, then under some other decree of Court. On this point we also refer to the considerations contained in the quotation from Mr. Jones' book on Corporate Mortgages, at page 24 of the brief hereto annexed.

In regard to the ninth reason assigned: This reason presents for review only a question of fact in reference to this particular corporation and these particular mortgages, viz: whether authority had been given by the Board of Directors to execute these mortgages, and both Courts below have decided adversely to the petitioners on this point, and it does not present a question which

will justify the review of the case by the Supreme Court of the United States.

In reference to the tenth reason assigned, the question herein mentioned was argued at length before the Circuit Court of Appeals and is based upon an erroneous assumption of the law. The mortgagor company was authorized to mortgage its franchises, contracts and water works plants, both by its contract with the municipality and by the statute law of the State under which it was organized, and there is no law in Nebraska forbidding it. This matter is discussed under points I and II of the brief hereto annexed.

The eleventh reason suggested raises a pure question of the policy of the State of Nebraska as to whether that State will permit foreign corporations to do certain things within its limits and is not a question which can be raised by the petitioners in this case. The State alone can object, not a corporation which has enjoyed the fruits of an act which it now alleges to be illegal.

The twelfth reason assigned by the petitioners is not true in fact, and the law therein referred to has no application to the mortgagor company, for the reason that it was organized under the laws of the State of Illinois, where the power of the corporation to borrow money and to issue its bonds is unlimited. This matter is also discussed in the brief which is herewith submitted in point II, beginning at page 31.

In reference to the thirteenth reason assigned, we would suggest that Clarkson, as Receiver, made no application for leave to answer *until after the case had been heard.* He was the appointee of the Court which denied his application for leave to answer. Questions only involving the regulation of the conduct of the Court's Receiver by the Court itself, do not present questions for review by an appellate tribunal. The Court which appoints the Receiver should determine what his conduct should be. This question, is, how-

ever, discussed under the last subdivision of Point V of the brief hereto annexed on page 52. It is also discussed in the opinion of the Circuit Court of Appeals.

Conclusion.

The suit at bar is an ordinary suit for the foreclosure of a corporation mortgage given to secure an issue of bonds, the interest upon which, after having been paid by both companies during many years, is long since in arrears. The defendants have been endeavoring to introduce into this case, for the purpose apparently of delaying the recovery of the money due to the bondholders, questions which have been decided against them in both of the lower courts without any dissenting voice. The reasons which are assigned for a review of the case in this court have all been considered by both the Circuit Court and the Circuit Court of Appeals, with the exception of the question of jurisdiction, which was decided adversely in the Circuit Court, and has never been presented to the Circuit Court of Appeals. There is no doubt as to the law on this question. The water works companies have both of them been dissolved on account of insolvency, and the interest is meanwhile accumulating upon the bonds. The property is now being advertised for sale. This Court should not interfere in this case, where delay means such serious loss to the bondholders unless the case made out by the petitioner is one of great gravity and of sufficient importance to warrant a further delay, and unless this Court feels satisfied that the questions raised by the petitioners present serious questions in controversy. The fact urged by the petitioners that certain questions have never been presented to this Court for determination, is not a reason for reviewing this case, even if it were true. Water works companies have been in general operation in this country for years, have constantly made mortgages and issued

bonds, and the fact that no question has ever been raised as to their power to execute these instruments is in itself an argument in favor of the proposition that it is the opinion of the profession generally that no ground exists for urging such claims. In this case both the statutes of the States of Nebraska and Illinois, and the contract with the City of Omaha, expressly authorized these mortgages.

The petition for the writ of certiorari should be denied.

DAVID MCCLURE.

Of Counsel for The Farmers' Loan and Trust Company.

United States Circuit Court of Appeals,

EIGHTH CIRCUIT—DECEMBER TERM, 1895.

No. 715.

THE AMERICAN WATER WORKS COMPANY (OF ILLINOIS) *et al.*,
Appellants,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,
Appellee.

No. 716.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,
Appellant,

vs.

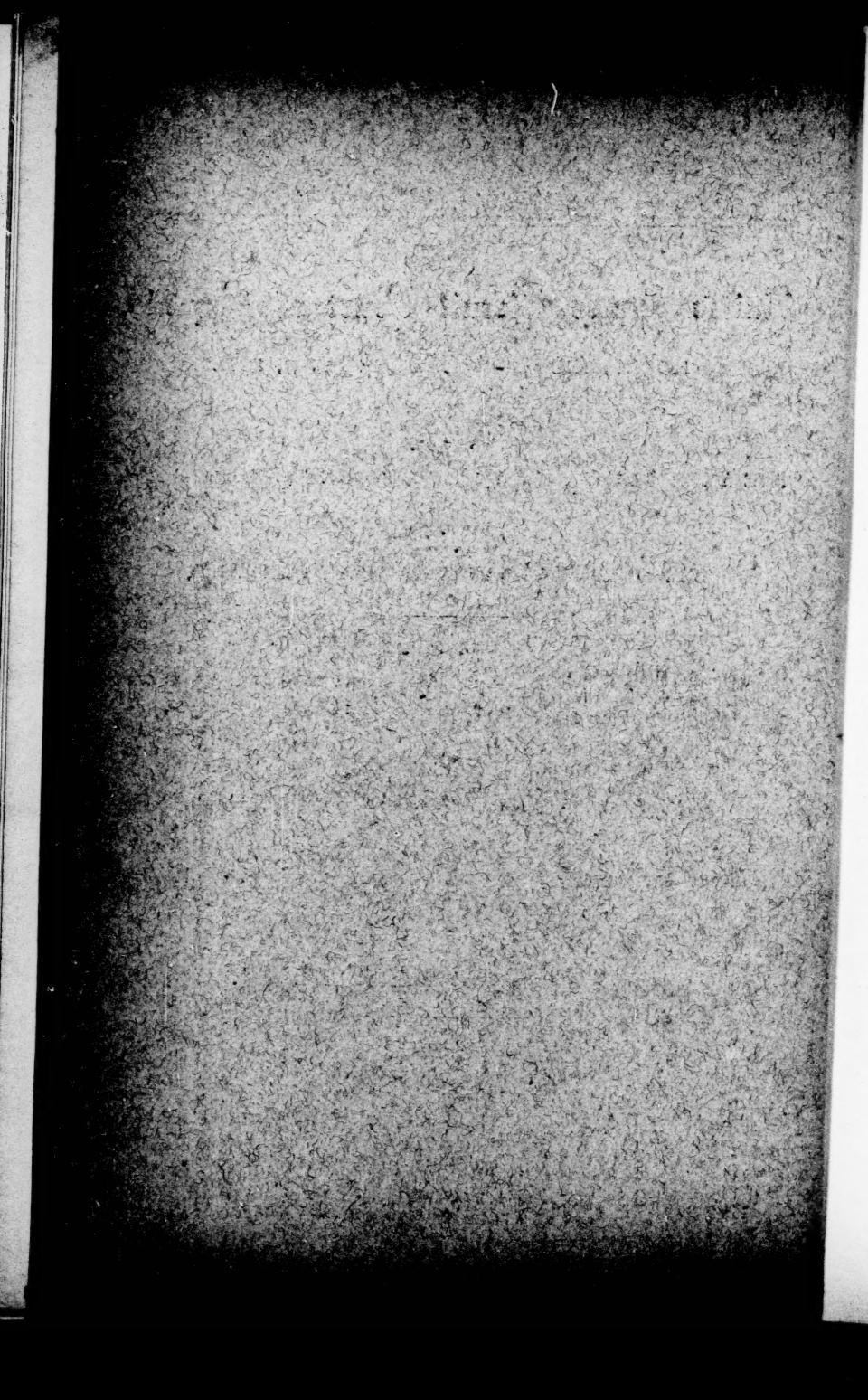
THE FARMERS' LOAN AND TRUST COMPANY,
Appellee.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLEE.

R. S. HALL,
J. M. WOOLWORTH,
DAVID McCLURE,
Of Counsel for Appellee.

MARTIN B. BROWN, Printer and Stationer, 49 to 57 Park Place, N. Y.



United States Circuit Court of Appeals,

EIGHTH CIRCUIT.—DECEMBER TERM, 1895.

THE AMERICAN WATER WORKS COMPANY (of Illinois) *et al.*, Appellants, *vs.* THE FARMERS' LOAN AND TRUST COMPANY, Appellee.	No. 715.
THADDEUS S. CLARKSON, Receiver of the American Water Works Company, a corporation of the State of Illinois, Appellant, *vs.* THE FARMERS' LOAN AND TRUST COMPANY, Appellee.	No. 716.

Appeals from the Circuit Court of the United States for the District of Nebraska.

Brief for Appellee.

These are appeals from the decree of the Circuit Court of the United States for the District of Nebraska which foreclosed two certain mortgages made by the defendant, the American Water Works Company (of

Illinois). The defendant, the American Water Works Company (of New Jersey), is a subsequent grantee of the mortgagor company.

Statement.

The defendant, the American Water Works Company (the Illinois corporation) was organized on the 29th day of March, 1887, under an act of the State of Illinois, approved April 18, 1872, and the acts amendatory thereof (Record, p. 125).

The object of this corporation, as set forth in its certificate, was to build, equip and operate water-works, to supply water to cities, towns, villages and municipal and other corporations; to acquire, by purchase, lease or otherwise, such works and to operate them, and to deal in the stocks and bonds of other corporations and associations for a similar purpose, the business to be carried on in the State of Illinois and elsewhere. The capital stock was fixed at $600,000.

This corporation, received from the City Water Works Company of Omaha a deed of conveyance transferring to it all the property, real, personal and mixed, of the said City Works Company and all its franchises and privileges.

The American Water Works Company (of Illinois) then made a mortgage to the Farmers' Loan and Trust Company, dated July 1, 1887, to secure an issue of $4,000,000 of bonds (Record, p. 20). $400,000 of this issue were to be reserved to take up an issue of bonds to that amount which had been executed by the City Water Works Company, and were a lien upon the plant which had been transferred to the Illinois Company. This mortgage provided, among other things, that interest on the last $2,000,000 of bonds to be issued under it might be reduced to five per cent. instead of six, and subsequently the interest was reduced.

On January 16, 1889, a supplemental mortgage was executed by the Illinois company to the Farmers' Loan and Trust Company as further security for the bonds, and provided that the bonds should be payable in gold (Record, p. 45).

The original mortgage provided that if the mortgagor company should at any time make default in the payment of interest on said bonds, or any instalment or part of any instalment thereof, at the time, in the manner and at the place when and where said interest, or any instalment or part thereof, should be due and payable, and in case such default should continue for ninety days, it should be lawful for the Farmers' Loan and Trust Company to foreclose said mortgage and forever bar the mortgagor company of all equity of redemption therein (Record, p. 33).

In 1891 the defendant the American Water Works Company (of New Jersey) was incorporated and a deed executed to it by the Illinois company. *The deed was made expressly subject to the mortgages of the City Water Works Company and the mortgage and supplemental mortgage of the American Water Works Company (of Illinois), now being foreclosed* (Record, pp. 235–237). At the same time an assignment of rights under contracts was made (p. 240).

It appears from the testimony introduced by the defendants herein that there are outstanding unpaid coupons secured by the mortgage and supplemental mortgage foreclosed herein to the following amounts: Of the coupons maturing January 1, 1892, $38,275; of the coupons maturing July 1, 1892, $47,500; of the coupons maturing January 1, 1893, $22,500; of the coupons maturing July 1, 1893, the entire issue, $98,000 (Record, Venner, p. 185). This statement is inaccurate; but there is no dispute that a very large amount of the said coupons are outstanding unpaid. Of the unpaid coupons maturing January 1, 1892, July 1, 1892, and January 1, 1893, $19,900 have been de-

posited with the Farmers' Loan and Trust Company, subject to the agreement of the bondholders, whose committee requested the present foreclosure (Record, pp. 172–174). It therefore appears undisputed that a default has been made in the payment of some part of the coupon interest beginning with January 1, 1892, and ending with the coupons of July 1, 1893, on each of the interest days, and there was, therefore, a breach of the condition of the mortgage which entitled the Farmers' Loan and Trust Company to bring the suit for the foreclosure of the same. It is stipulated in this case that at least $50,000 of coupons were unpaid for more more than ninety days prior to the filing of the bill (Record, p. 209).

Mr. Venner and his friends who hold *coupons* only, not bonds (pp. 197, 198), might be willing that the foreclosure should not be carried through, inasmuch as by the terms of the mortgage the unpaid coupons constitute a prior lien upon the entire mortgaged property, to be paid in preference to the principal (Record, p. 32). As these defaulted coupons are drawing interest and are secured by property of such great value, persons holding them, perhaps, are content that they should not be now paid. We would observe, however, that there is no competent evidence in the case as to whether the holders of the coupons which Mr. Venner alleges he purchased do or do not desire a foreclosure (pp. 185–188). All the evidence which he attempted to give on this point was objected to as hearsay and should be disregarded by the Court; and, besides, it is contradicted by the fact that certain of the parties mentioned by him have requested the foreclosure of the mortgages. The holders of coupons have no power to waive the right to foreclose. This right is vested in the bondholders (Record, p. 40).

Out of a total issue of $3,600,000 of bonds, $3,509,000 have been deposited with the Bondholders' Committee, which requested the foreclosure of the mortgage,

leaving but $91,000 of bonds outstanding in the hands of persons who have not requested foreclosure (Record, p. 171).

It can readily be seen that the bondholders object to the continuance of the accumulation of the coupons ahead of their mortgage.

We notice in passing that the appellants in their statement of the case in Subdivisions 2 and 3, say that the answers filed by the defendants set up that the mortgagor company had no authority to issue said bonds. A reference to the answers will show that no such issue is raised. The defenses set up go to the invalidity of the mortgage and not the invalidity of the bonds.

On page 12 of the appellants' brief the assertion is made that there is nothing in the record showing a transfer of the legal title of the property in controversy from the City Water Works Company to the American Water Works Company of Illinois, save inferentially from paragraph 6 of the answer. This is a mistake. Of course no evidence of this kind is necessary in the case, because the mortgage foreclosed was made by the American Water Works Company, and all matters prior to the date of the making of the mortgage would be irrelevant to any issues raised by the pleadings; but the mortgages sued upon were offered in evidence by the complainant (page 166, marked "Exhibits 1 and 2") and will be found printed as exhibits to the bill of complaint, beginning at page 20. Both mortgages contain a recital, and therefore an admission in most solemn form, that the American Water Works Company had purchased from the City Water Works Company its water-works (Record, pp. 20, 45).

I.

The City of Omaha was authorized to erect water-works, or to contract for their erection with individuals or corporations. The contract for their erection was duly made and duly assigned.

The act of the Legislature of the State of Nebraska approved February 27, 1879, entitled "An Act to amend section fifteen (15) of an act entitled 'An Act to incorporate cities of the first class,' approved March 28, 1873," provided among other things, in clause 27, that the Mayor and Council of each city created and governed thereby, shall have the power "to erect, construct and maintain water-works either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of the water supplied by such water-works, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of such water-works;" and they shall also have power "to contract with and procure individuals or incorporations to construct and maintain water-works *on such terms and under such regulations as may be agreed on.*"

See Session Laws of Nebraska, 1879, p. 95.

On page 22 *of appellants' brief is found a quotation from a later statute passed in* 1887 *(see session laws of that year, page* 103*). This statute has no application to the present case.* The first ordinance under which the water-works were erected was passed June 11, 1880. It happens that the two statutes are substantially the same down to the concluding clause. For the purpose of comparison we place the final clause of the two acts sid by side.

Act of 1879.	Act of 1887.
"The mayor and council of each city created or governed by this act shall have power to contract with and procure individuals or incorporations to construct and maintain water-works on such terms and under such regulations as may be agreed on.	The mayor and council of each city created or governed by this act shall have power to construct and maintain water-works on such terms and under such regulations as may be agreed on, or to provide by contract for the construction and maintenance or leasing of water-works, or any main or line thereof or settling basins therefor.

The statute of 1879 above quoted authorized the City not only to contract for the construction of works which, when built, were to be its property, and to be operated and maintained by it, but also to contract with any party for the construction of works by such party, who, after their completion, was himself to own and operate them. *And the City might make such contracts as the two might agree on.* The whole matter was committed to the discretion of the Mayor and Council; they might make such terms as their judgment approved. For instance, a question might arise between them and the party with whom they were negotiating, what rights he should have in the streets for the purpose of laying his mains or pipes therein, or what rates he might charge the City and individual consumers for water to be supplied by him; or whether the contract should run for five years, or twenty, or fifty; or whether the City should have the option of buying the works, and, if it should have such option, when and on what terms it might exercise it. All these matters were to be agreed upon by the parties, and the Mayor and Council in settling them were free to act according to their own judgment.

Another question arose: Whether the contractor should be required to operate the works personally, or be permitted to transfer them to another who should operate them in his place. The City might reasonably insist that it was satisfied with the honesty, business capacity, and financial ability of the party with whom it was dealing, but was unwilling to engage itself to

others it knew not of; while the other party to the negotiation might on his part reasonably insist that he could not engage his personal services for a period beyond a business man's life, so that, in case of his death, his personal representative would be unable to execute the contract; or in case he might at any time wish to withdraw his capital from the adventure, he would not agree to sell and convey the property. These were matters to be agreed upon by the parties; just as much so as whether the City should grant the use of the streets, or authorize high rates or low, or limit the term to five years or extend it to fifty, or reserve the right to purchase the property.

Under the authority conferred upon them by the last clause of the above-recited section of the Act of 1879, on the 11th of June, 1880, the City Council passed an ordinance, the provisions of which, so far as it is necessary to this inquiry to state them, were as follows (Record, p. 149):

Section 1 provides that any person, company, corporation, or association, who shall erect, construct and maintain water-works upon the principles of a system, and with a capacity and in a manner very particularly described in a report filed May 25, 1880, in the City Clerk's office by one J. D. Cooke, and approved by the City Council, for the purpose of supplying the city and its inhabitants with water for domestic, mechanical and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares and public places of said city, for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company, corporation, or association, *or their assigns*, shall maintain and operate any such water-works, and while constructing the same.

Section 2 provides that the water shall be taken from the current of the Missouri river at certain places therein defined, and shall be settled, cleansed and

purified, so that the water shall be good and clear, suitable for culinary and drinking purposes, and not detrimental to the health of those who use it.

Section 3 prescribes the capacity of the works.

Section 4 defines the sizes and lengths of the mains.

Section 5 regulates the laying of the mains, pipes, fixtures and hydrants, and confers upon any such person, company, corporation, or association, *or their assigns*, the right to disturb, remove and dig up the surface and material of the streets, etc.

Section 6 requires the laying of the mains at places designated in the said report, so as to allow the location of at least 250 hydrants.

Section 7 provides that any person, company, corporation, or association, *or their assigns*, who shall construct any such water-works, shall build substantially fireproof all buildings and other structures necessary for their machinery or any apparatus that may be needed for their legitimate purposes.

Section 8 provides that any person, company, corporation, or association, or *their assigns*, who shall construct any such water-works, shall furnish water to the city, free of charge, for certain purposes.

Section 9 provides that the grade of a street shall be established before placing mains or pipes thereon.

Section 10 provides that any person, company, corporation, or association, or *their assigns*, who shall construct such water-works, shall furnish water to citizens at rates therein limited.

Section 11 provides that any person, company, or corporation, or *their assigns*, who shall construct water-works under this ordinance, who shall refuse or neglect to comply with its provisions and keep the work in good order and repair, shall forfeit their rights,

privileges and immunities, granted and acquired ; and the city shall become invested with the ownership, possession, control and management thereof upon paying just compensation therefor.

Section 12 provides for advertising for bids for furnishing for twenty-five years the city with water for fire protection and public use, through 255 hydrants of the character and at the locations mentioned in the ordinance, the bids to specify the price of water per hydrant per year ; and that the contract therefor shall be awarded to the lowest responsible bidder ; and requiring from him a bond for the faithful performance of the terms and conditions of the ordinance, in the penal sum of $25,000, with three resident sureties.

Section 13 provides that the work shall be constructed and completed within one year from and after the award of the contract.

Section 14 provides that the city shall have the right at any time after twenty-four years to purchase the works at an appraised value.

On the 15th of July following, this ordinance was amended in some particulars not material to the present inquiry (Record, p. 156).

On the 20th of the same month, a contract was entered into by and between the City and Sidney E. Locke for supplying the City with water for fire protection through hydrants as called for by the ordinances, for which the City was to pay at rates and in the manner therein specified (Record, p. 159).

On the 11th of November, another ordinance was passed permitting "S. E. Locke, or *his assigns*, contractors with the City of Omaha for the erection and maintenance of water-works, and supplying said city with water for public use, to change the location of the reservoirs" (Record, p. 161). In this ordinance it was among other things recited, that on the 6th of October,

1880, S. E. Locke, or *his assigns*, filed with the City Clerk a report of Mr. Cooke recommending the proposed change, and also that Locke and his assigns had made petition to change the location of the reservoirs accordingly; and the ordinance authorized Locke and his *assigns* to make the change. But the change was not to be effected until Locke and *his assigns* filed in the office of the City Clerk their written acceptance and consent to the ordinance, and also the consent of the sureties on his bond. The contract was assigned by Locke to the City Water Works Company of Omaha, which constructed the works.

On the 4th of September, 1883, another ordinance was passed providing that "the water-works constructed by the City Water Works Company, of Omaha, *assignees or successors* of Sidney E. Locke under the ordinance above-mentioned, and the contracts entered into in accordance therewith, should be accepted by the Mayor and City Council as full and complete compliance with such contract and ordinances, by said Water Works Company" (Record, p. 164).

On the 3d of August, 1880, the City Water Works Company made and negotiated its bonds, aggregating $400,000, of that date, as above set forth, and secured them by its mortgage upon its works running to the complainant.

In conferring upon the Mayor and Council the power to make a contract, with such terms as they in their judgment may agree to, the Legislature authorizes them to stipulate that the contractor may convey, mortgage and assign his works and the franchise of operating them, and give the consent of the State to an alienation of the works and of the right to operate them, if the municipal authorities see fit to grant such power. The case would not have been plainer if the statute had said in so many words, "The City may contract with any person to build and operate water-works, and such person may, if the City sees

fit to grant the power, convey them to any other party, together with the right and franchise of operating them." Such a clause would clearly give to the contractor the right to alienate the property and franchises, and such a right the contractor clearly has.

This explanation of the statute relieves us of the objection that in making the mortgages the Company exceeded its corporate competency. The question of *ultra vires* is out of the case. The question of *ultra vires* will again be considered in this brief, from other points of view, but we insist that the act of the city under the statute of 1879 removes any such question from this case.

But it may be contended that this does not meet the difficulty; that an objection of much the same nature is presented upon a doctrine of the law of contracts. That doctrine is thus stated by Pollock:

"Rights arising out of contracts cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided" (Contracts, 4th Ed., 425).

Looking at the case in that aspect, we submit that the convention between the Mayor and Council and Locke vested in the latter the right to alienate the works and the franchises which were conferred upon him.

The terms of their convention, by which the question is to be determined, consist of the ordinances and the contract already set forth.

The particular terms of the ordinances show that the Mayor and Council intended to confer upon any party who should build the works and operate them, and with whom they should contract for fire protection, the power to convey the property and assign the right secured thereby. That they did so appears from the

terms constantly recurring throughout the ordinances, which confer upon the *assigns* of the party who should build the works, as well as upon him, the rights and privileges thereby secured.

This word *assigns*, used at every proper point in the ordinance, implies the right of one party to alienate his property and the rights acquired by him to another. This appears from the meaning of the word. In Murray's New Dictionary it is defined thus: "One to whom a property is legally transferred."

In the Century Dictionary it is defined as "A person to whom the property or interest of another is or may be transferred, as a deed to a man and his heirs and assigns. Assign is a broader word than assignee. The assignees of a person are usually understood to mean those who take immediately from him by his assignment: the assigns of a person include all who acquire title under his transfer immediately or remotely." Now, if we read the ordinance with one of these definitions inserted in place of the word, it is very plain that the assignment of rights acquired under the ordinance was contemplated. To illustrate this, read the first section in this way:

"For the purpose of laying and placing in position said mains," etc., "any such person," etc., "and one to whom he shall legally transfer his property and right, shall have the right to disturb the street," etc.

And going through the other clauses of the ordinance in the same way, the right of assignment appears to be implied by this word "assigns."

If there were any doubt upon the face of the ordinance, of its proper construction, we may resort to the acts of the parties at or about the time of its passage, in order to ascertain their understanding of its meaning.

On the 11th of November following the passage of the ordinance which we have already noticed, another was passed reciting that, "On the 6th of October, A. D. 1880," the said S. E. Locke, or his assigns filed with the City Clerk, Cook's Report recommending a change of the site of the reservoir, and that Locke or his assigns had made petition and request to change the location. Locke and his assigns were authorized to change the location accordingly. But it was provided that the written acceptance and consent to this ordinance of the said S. E. Locke and his assigns should be first filed (p. 163). It appears that the works were accordingly constructed, and on the 4th day of September, 1883, an ordinance was passed by the Council and approved by the Mayor, accepting as full and complete compliance with the ordinances and Locke's contract, "the water-works constructed by the City Water Works Company of Omaha, assignees and successors of Sidney E. Locke" (p. 164).

These ordinances show not only an assignment of Locke to the City Water Works Company, but that the proper authorities of the city understood that such assignment was within the prior ordinances.

A careful review of the statute, with this subject in mind, will discover the intention of the Legislature to bring the assigns of the company within its privileges and penalties, which makes it certain that such persons and the means by which they became parties were in contemplation.

We might suggest that the defendant companies are not in a position to raise the question of the power to alienate the property in question. Whatever title they have was derived through a conveyance from the City Water Works Company, which in turn derived its title from Locke. The City of Omaha is not complaining and cannot complain. It is not a party to this suit. Probably only the State of Nebraska could present the question.

On page 52 on his brief, the counsel for the appellants says:

"We know of no case in the books, nor do we believe one can be found, which holds that the use of the word 'assigns' is an affirmative grant of power to make a transfer of property."

Without much difficulty we have been able to find a case which holds substantially what the learned counsel was unable to find. The case of the *California State Telegraph Company* vs. *Alta Telegraph Company*, 22 Calif., 422, presents these facts. An Act of the Leglature granted "to Allen & Burnham or their assigns, the right and privilege to construct and operate a telegraph line" between certain points. Thereafter an attempt was made to grant a new company the right to erect a telegraph line between the same points, and the plaintiff, to whom Allen & Burnham had assigned their rights, brought an action for an injunction. The defendant endeavored to defeat the application by claiming that the privilege granted was non-assignable and that consequently the plaintiff had no title.

Justice Crocker, who rendered the opinion of the Court, says:

"The next and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had the power to sell and convey, for the act specially makes the grant to them or 'their assigns,' thus clearly making the privileges assignable."

Chief Justice Cope, concurring, said:

"As to the power of the Legislature to grant the franchise in question I have no doubt, and as to the capacity of the corporation to purchase, the defendant is not the party to object. If the corporation, in making the purchase, has acquired property which, under the law of its incorporation, it had no right to acquire, all that can be said is that it has exceeded its powers,

and may be deprived of the property by a judgment of forfeiture. The question is one which the State alone can raise."

II.

The American Water Works Company of Illinois had full authority to mortgage its property either in Illinois or Nebraska.

The execution of a mortgage by a corporation is *presumptive proof* of the corporation's right to mortgage, and, therefore, the burden rests upon those who object, to show a lack of legislative authority.

Nelson vs. *Eaton*, 26 N. Y., 410.

The appellants have argued that the mortgage is void, first, because there is no statute in Nebraska or Illinois authorizing such mortgage; secondly, because the water company was without authority to dispose of its property so as to disable it from performing its public duty to the city; and thirdly, because of the public character of the corporation. This point is really included in the second. The fourth point raised by the appellants is included in the first two.

(1) As to the necessity of a statute to authorize a corporation to mortgage its property.

The rule of law is that no statute authorization is necessary for the purpose of giving to a corporation the power to execute a mortgage upon its property.

This principle is laid down in the latest work on corporations—Thompson's Commentaries on Corporations, volume 5, section 6133—as follows:

"We have already seen that, according to the American doctrine, every private corporation has an implied power to *borrow money* to enable it to carry out the

purposes of its creation and to issue the usual and appropriate *evidences of debt* therefor. This power carries with it by the same reasonable implication the power to *mortgage its property* to secure any debts which it may lawfully contract for the purposes of its creation; and such is the universal American doctrine, in the absence of statutory prohibitions, and saving always those corporations whose property is dedicated to the performance of public duties. With this important exception, it may, therefore, be laid down that every private corporation, in the absence of any prohibition in its charter, or governing statute, may borrow money for the purpose of carrying out the lawful objects of its incorporation, and may mortgage its real and personal property to secure the loan."

The question what is meant by a corporation whose property is dedicated to the public for the performance of public duties will be hereafter considered. It may be said in passing that this same author, in considering this particular question, in section 6137, only refers to railroad companies as coming within this class of corporations

In *Jones* vs. *Guarantee & Indemnity Co.*, 101 U. S., 622, the United States Supreme Court inquired into the power of an oil company to give a mortgage for future advances, holding that it had such power. In the course of the opinion the Court said:

"At the common law every corporation had, as incidental to its existence, the power to acquire, hold and convey real estate, except so far as it was restrained by its charter, or by Act of Parliament. This comprehensive capacity included also personal effects of every kind. The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. * * * A mortgage for future advances was recognized as valid by the common law. * * * It is believed that they are held valid throughout the United States, except where forbidden by the local law."

In *Australian Auxiliary Steam Clipper Co.* vs. *Mounsey*, 4 K. & J., 733, Vice Chancellor Page-Wood held that a ship company could mortgage their ships:

"I cannot see why it should not be within their ordinary province to raise money by a mortgage of their ships, either for the purpose of buying new ships or paying creditors."

In the *Matter of Patent File Co.*, L. R., 6 Ch. App., 83, Lord Justice Mellish said:

"It is urged that no company can mortgage unless expressly authorized to do so. Now the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so."

It would seem, therefore, that the absence of a statute granting power to water companies to make a mortgage, is not an argument against the existence of such a power. It may be that in Nebraska statutes are only found authorizing corporations engaged in running railways and owning depots and conducting similar business, to mortgage their property. The reason of this, however, is the decisions of the courts to the effect that railroads have no authority, without express statutory enactment, to make mortgages. The fact that no statutes have been passed authorizing water companies to execute mortgages, indicates rather the general opinion that no authority of this kind is necessary, because it is well known that corporate enterprises of the extent and character of water works companies could not be carried on without the raising of money by the usual and ordinary means.

The right of mortgaging follows as a necessary incident to the right of managing the business of a corporation according to the usual methods of business men. Ordinary private corporations for gain, having no public functions, not only have an implied power to incur debts and borrow money for the purposes of the corporation, but also an implied power to pledge either real or personal property as security. In the United States the rule is established without the least conflict of authority. The power of such corporations to mortgage, unless expressly prohibited, goes *pari passu* with the

power to incur debts, and to carry on business, in the fulfillment of their corporate franchises.

Corporations not expressly restrained may borrow money to carry out the legitimate objects of their incorporation, and secure the payment of it by a mortgage of their property. Thus, for instance, a corporation (*Hays* vs. *Galion Gas Light & Coal Co.*, 29 Ohio St., 330) organized for the purpose of manufacturing and supplying gas to the inhabitants of a city or village, is under no restriction in this respect arising by implication from the nature of the business it was created to engage in.

These principles are fundamental and need the citation of no authorities to support them.

1 *Mor. on Priv. Corps., p.* 332.
Jones on Corp. Bonds and Mtgs., sec. 5.

2. Undoubtedly corporations cannot neglect to fulfill the duties in consideration of which their franchises are given them, under penalty of forfeiting to the State the rights with which the State has endowed them. And for the same reason, and upon the same penalty, it may be claimed that public corporations, or *railroad* corporations, which in their nature are public, cannot do any act which would result in disabling them from performing their public duties.

Upon these propositions a doctrine has sometimes been based that *a railroad corporation* cannot mortgage its permanent way and fixed plant without affirmative legislative authority so as to give to the mortgagees the right to interfere with the use and possession of the property by the railroad company, thus disabling the latter from fulfilling its public duties.

"The foundation of the doctrine is that such a mortgage tends to defeat the purposes for which the corporation was chartered, and the implied undertaking of those who obtained the charter to construct and maintain the public work, and exercise the franchises for the public benefit."

Memphis Co. vs. *Dow*, 19 Fed. Rep., 388.

The railroad doctrine is derived, as is said by Mr. Jones in his work abve quoted, section 5:

"Not from the fact that it (the corporation) subserves a public use, and is beneficial, or it may be necessary to the general public, but * * * only when the State, in view of the public purpose of a corporation, has conferred upon it special privileges."

This *railroad* doctrine is not by any means established as settled law even in regard to railroads. It may well be doubted if any such rule, founded in the merest technicality, the necessity for which is not at all borne out by experience, that real ground of equitable doctrines, has been adopted *in to'o* by any single jurisdiction. The essential feature of judicial sales of railroad property, or of the property of any extensive corporations engaged in transactions which require the use of broad areas of realty, is that such property is always sold as an *entirety*, is *not* dissipated, not interfered with so as to prevent the fulfillment of public benefits, but is ordinarily—indeed, always—turned over to parties who *continue* the corporate business, and shoulder the burdens, if there be any such, which the public has cast upon the use of the property.

Inasmuch as the authorities on this point all refer to *Gue* vs. *Tide Water Canal Co.*, 24 How., U. S., 257, it may be well to consider the reasons which led the Court in that case to conclude that an *execution* sale of such property would be enjoined. The Court says:

"It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the Circuit Court of the United States for the District of Maryland, upon which he issued a *fieri facias*, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf and sundry other lots, all of which property, it is admitted, belonged to the Canal Company in fee.

* * * * * *

The Tide Water Canal is a great thoroughfare of trade, through which a large portion of the products of

the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide-water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of Assembly which created the corporation. The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and if sold under this *fieri facias* without the franchise, would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the States, it must be under a statutory provision of the State; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized, and consequently if the sale had taken place the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise; and it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment; and equally against the principles of equity to permit him to destroy the value of the property of the stockholder by dissevering from the franchises property which was essential to its useful existence.

In this view of the subject, the Court do not deem it proper to express any opinion as to the right of this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of

Assembly of the State of Maryland referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a Court of Chancery, where the rights and priorities of all the creditors may be considered and protected and the property of the corporation disposed of to the best advantage for the benefit of all concerned. A Court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the Circuit Court was right in granting the injunction, and its decree is therefore affirmed."

It will be seen from this decision of Chief-Justice Taney that the ground upon which he bases his opinion is that an execution sale of property such as a canal would deprive the corporation of a part of its property, and so prevent its using the property which would then remain in its hands. In other words, his argument is based upon the breaking up of the property, whose value consists in its being maintained as an entirety. He suggests in his opinion, as we see, that in a proper case in equity it might be that a remedy could be had for the execution creditor.

The cases which are cited by the appellants which alone hold that a *mortgage* cannot be made without legislative authority are railroad cases. The cases of other corporations mentioned are those arising in actions brought to enjoin the levy of an execution upon specific property of a corporation, or actions brought for the enforcement of mechanics' liens upon parts of the corporate property.

The case of *Susquehanna Canal Company* vs. *Bonham* (9 W. & S., 27) was similar to the case of *Gue* vs. *Tidewater Canal Company*. The cases of *Foster & Co.* vs. *Fowler Company* (60 Pa. St., 27), *McNeill Pipe and Foundry Company* vs. *Bullock* (38 Fed. Rep., 565) were cases in which mechanics' liens had been filed against the property of water companies.

The case of *Louisville Water Company* vs. *Hamilton* was also a case of a levy of an execution against a water company.

The case of *Bath Gaslight Company* vs. *Claffy* (26 N. Y. Sup., 287) is not a decision of the highest Court of the State of New York, but the case holds that a gaslight company could not lease its property and franchises to another corporation. The Court in this case says:

"It does not, however, follow that there can be no recovery in the case of a contract *ultra vires* which has been partly performed. All the authorities concede that, although all do not agree as to the form in which the recovery may be had. * * * Assuming, therefore, that the contract was void—which need not necessarily be determined—I regard it as of no importance whatever whether the plaintiff was to recover in his complaint upon the contract or in disaffirmance of it. The only difference is between an express or implied agreement, and the nature of the cause of action in each case is the same and the agreement is some evidence of the value of the use. All the cases cited from the Court of Appeals were, however, upon the contract, and recovery was had in all upon the ground that to decide otherwise would be to accomplish a wrong and not promote justice, and especially would this be the case when neither the people of the State in which the corporation was created nor any stockholder of the plaintiff corporation has complained or objected to the contract."

It will not do for Courts, under the guise of judicial decision, to legislate. In *People* vs. *Chicago Trust Company* (130 Ill., 294) the Court says:

"Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied (Greenwood on Public Policy, pp. 2 and 3.")

We doubt very much whether if the case were presented now as a new question the Courts, now holding such views, would decide that railroad companies have not authority to mortgage their property and franchises independently of statute.

The cases holding the contrary, argue, as is set forth by Mr. Jones in his book on Corporate Bonds and Mortgages:

"That the change which takes place in a corporation through the foreclosure of a mortgage is no greater than that which may take place within the original corporation by a transfer of shares, and that the public interests are as safe in such new hands as they were in those of the original corporators. * * * The argument that it is dangerous to the public interests to have the privileges conferred by a railroad franchise transferred to a new body, by the action of the corporation itself, is declared to be of little weight, inasmuch as the active management of the corporation is liable to be changed at any time by the action of the stockholders, and that in all cases the interest of the original corporators is but a temporary matter. The privileges conferred upon them soon pass in the ordinary course of things to others. By a foreclosure the change of control may be no more complete, and there is no reason to suppose that the purchasers will manage the property with any less regard to the public interests. The Supreme Court of Vermont regarded the idea as altogether fanciful and theoretical, that because the franchise is conferred upon a particular body of men, constituting the corporation, a special confidence in them to answer the trusts in behalf of the public is implied; declaring that, from the nature of the case, there could not be—for the reason that it lies with the shareholders of the capital stock to say who shall compose the corporation at any given time—one set of men to-day, another to-morrow, some citizens of the State, some foreigners; that the true idea is, that the public relies, for its assurance that its rights will be duly protected, upon the fact that they *must* be, in order that the conferred privileges may be held and enjoyed by the corporation of whomsoever composed, not upon any personal confidence which the legislature has in an indiscriminate body of persons (men, women and children, citizens and foreigners), daily changing, who may become or cease to be stockholders at their own pleasure and without restraint."

Jones on Corpt. Bds. & Mtges., sec. 18.

No sooner had the courts decided that railroad companies had no implied power to mortgage than the

State Legislatures began passing acts authorizing such mortgages to be made, so that now, we believe, that in every State in this Union a railroad company is authorized by statute, or without statutes, to make a mortgage upon its property and franchises. Of course these statutes provide for certain formalities which, in view of the peculiar character of the property, is reasonable. Further than this, the legislatures have now passed laws allowing mechanics' liens to be filed against property of this character, although the wisdom of these statutes may be doubted, inasmuch as they will result in breaking up the unity of the property.

There are constantly cropping up in these foreclosure suits slim arguments on behalf of factious parties, based, or alleged to be based, on the public nature of corporate enterprises and the alleged rights of the public to interfere with their administration. The ingenuity and insistence with which these arguments are pressed on all conceivable points in spite of the rebuffs of Courts, and the difficulty of proving how the parties pressing them became the champions of the public, authorized to vindicate alleged public rights at the expense of the most solemn contracts, would be surprising if the reason of this zeal were not made apparent by the position of the parties exhibiting it.

In the case of *Memphis Co.* vs. *Dow* (19 Fed. Rep., 388), Judge Wallace says :

"Some judicial opinion is found to the effect that there is no good reason for denying the right to make such a mortgage without legislative consent, because the transfer of the franchise to new hands, through a foreclosure, is, in fact, a change no greater than may take place within the original corporation, and the public interests are as safe in such new hands as they were in those of the original corporators. *Shepley* vs. *Atlantic & St. Louis R. R. Co.*, 55 Me., 395–407 ; *Kennebec, etc., P. R. Co.* vs. *Portland R. Co.*, 59 Me., 9–23 ; *Miller* vs. *Rutland & W. R. R. Co.*, 36 Vt., 452–492."

Memphis, &c. Co. vs. *Dow*, 19 Fed., 388.

See also—

Bardstown & L. R. Co. vs. *Metcalf*, 4 Met., Ky., 199.

Savannah & M. R. R. Co. vs. *Lancaster*, 62 Ala., 555.

Kelly vs. *Alabama & C. R. R. Co.*, 58 Ala., 489.

Thus it appears that the doctrine that *railroad* corporations cannot, without express legislative authority, transfer their franchises, or the property necessary to enable them to exercise those franchises by way of a mortgage, is by no means established. *In any event, that doctrine is restricted to railroad corporations*, like many other doctrines which are founded upon the peculiar character of those corporations, as, for example, the doctrine of *Fosdick* vs. *Schall*, which has been expressly held not to apply to *water companies*.

See *Wood* vs. *Guarantee Trust Co.*, 128 U. S., 421, where a mortgage of an *Illinois Water Works Company* was being foreclosed. There the Court said:

"The doctrine of *Fosdick* vs. *Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. *There is a broad distinction between such a case and that of a purely private concern.*"

A water works company is, therefore, "a purely private concern." The case last cited expressly decided this. It cannot, therefore, be affected by any doctrine which is founded upon the *public character* of the corporation.

The Courts in Michigan, Illinois, Maryland, New Hampshire, Indiana, Massachusetts, New Jersey, have held that the ordinary doctrine which implies the power to mortgage in the vast majority of corporations, exists, *unqualified* by this anomalous doctrine peculiar to railroad companies, in the cases of gas light

companies, church companies, banking companies, bridge companies, agricultural companies, and water companies; all of which are purely private corporations, although their objects may inure to some extent to the benefit of the public.

Detroit vs. *Mutual Gas Light Co.*, 43 Mich.' 594.

Hackensack Water Co. vs. *De Kay*, 36 N. J. Eq., 548.

Aurora Agricultural, etc., Society vs. *Paddock*, 80 Ill., 263.

West vs. *Madison Co. Agricultural Board*, 82 Ill., 205.

Susquehanna Bridge, etc., Co. vs. *Gen. Ins. Co.*, 3 Md., 305.

Richards vs. *Merrimack, etc., R. Co.*, 44 N. H., 127.

Methodist Episcopal Ch. vs. *Schutze*, 61 Ind., 511.

Willink vs. *Morris Canal*, 3 Green Ch., 377.

Wood vs. *Whelen*, 93 Ill., 153.

Monumental Nat'l B'k vs. *Globe Works*, 101 Mass., 57.

Inasmuch as the appellants have referred in several places in their brief to the case of *Thomas* vs. *Railroad Co.* (101 U. S., 71) as an authority, it may be well to refer briefly to the facts of this case. It appears that a certain railroad company had leased its road, buildings and rolling stock for a period of twenty years to three certain individuals. Subsequently an act was passed which permitted this railroad to be consolidated with another railroad company, subject to all the debts, liabilities and obligations of both of the companies. The first-mentioned railroad was thereupon delivered over to the consolidated company. The individual lessees then began an action for damages for breach of the contract under which the first company had been leased to them, the term of the lease not having expired

at the time of the consolidation. It will be noticed that in this case a lease had been made without authority of law and to individuals, who were not authorized by the laws of New Jersey to hold railroad property, and secondly, that the action was not brought to recover upon the part of the contract which had been executed, but for damages for breach of the non-executed part of the contract. In reference to the part of the contract which had been already executed, the Court was clear that all the dealings with the corporation must be allowed to stand. In order to show that this was the case presented to the Supreme Court, we quote from the opinion :

"In regard to corporations, the rule has been well laid down by Comstock, *C. J.*, in *Parish* vs. *Wheeler* (22 N. Y., 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

"But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract."

Many authorities have been cited by the appellants to show that the work carried on by a water company is of a public character. The United States Supreme Court, in the case of *Wood* vs. *Guarantee Trust Co.*, 128 U. S., 421, quoted above, held that such companies are "purely private concerns." Admit that appellants' authorities tend to show that the work of a water company is of a public nature, yet, further than hold-

ing this point, these authorities can have no application to this case.

The case of *People* vs. *Chicago Gas Trust Co.* (130 Ill., 268) was an action brought by the State of Illinois for the dissolution of the defendant company on the ground that it was formed to establish a monopoly of gas companies, not to build or run gas works, but to purchase a controlling interest in the stocks of other gas companies, so as to manage the entire business in the City of Chicago and fix the prices to suit itself.

In the case of *Chicago Gas Light Co.* vs. *People's Gas Light Co.* (121 Ill., 539), the Court refused to enforce a contract between two gas companies by which they had parceled out the City between them and thus cut off competition.

The case of the *New Orleans Gas Company* vs. *Louisiana Light Company* (115 U. S., 659) presented this state of facts: Under an old act of the Legislature an exclusive right had been given to a gas company in New Orleans to conduct the business of lighting the streets in the City of New Orleans. Subsequently, the Constitution of the State of Louisiana was amended so as to forbid the grant of exclusive privileges to any corporation, and an effort was then made to allow another corporation to lay mains in the City of New Orleans. The action was brought to enjoin the second company from proceeding, and the Supreme Court of the United States sustained the injunction on the ground that the amendment to the Constitution, as applied to this particular company, impaired the obligation of the contract.

The case of *Gibbs* vs. *Baltimore Gas Co.* (130 U. S., 408) was one brought by the appellant to recover on a contract for consolidating certain gas companies in Baltimore so as to prevent competition. The Supreme Court of the United States held that such a contract was void as against public policy, and that consequently the plaintiff could not recover for his efforts.

The corporations, however, which carry on business affecting public interests, do not necessarily become public corporations in consequence. As in the case of *New Orleans* vs. *Clark* (95 U. S., 644), the Supreme Court of the United States says:

"A private corporation, as well as individuals, may be employed by a city in the construction of work needed for the health, comfort and convenience of its citizens, and though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city, and for that purpose its obligations may be issued unless some constitutional or legislative provision stands in the way."

The power of water companies to make mortgages covering all their franchises and property was considered in the case of *Willamette Co.* vs. *Bank of British Columbia* (119 U. S., 191). The United States Supreme Court held that the mortgage in question was valid.

See also—

Salem Capital Flour Mills Co. vs. *Stayton Water-Ditch & Canal Co.* (33 Fed., 146, at p. 151).

It results from the above considerations that a water works company needs no express legislative authority to mortgage its property, but may do so by virtue of the general implied power to mortgage, which grows out of its right to manage its business according to the usual methods of business men.

But even if express legislative authority were necessary, it is little short of surprising that the defendants should attempt to raise this point, not only because estopped from so doing by every principle of equity (*Jones* vs. *Guarantee Co.*, 101 U. S., 628; *Memphis Co.* vs. *Dow*, 19 Fed., 393), but also because *the very act under which this Water Works Company was incorporated* gave it and all corporations, with few exceptions, the

right "to borrow money * * * and pledge their property, both real and personal, to secure the payment thereof," and provided that they might have and "exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed."

Rev. Stats. of Ill., chap. 32, p. 328, sec. 5,
Cothran's Annotated Edition.

And in Illinois even *railroad* corporations have general statutory authority to make mortgages (do., chap. 114, sec. 20).

The Illinois corporation carried with it into Nebraska its charter powers.

The United States Supreme Court said in the case of *Cowell* vs. *Spring Co.*, (100 U. S., 59):

"A general comity obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold and transfer property there equally as individuals."

A fortiori where a corporation comes into a foreign State to exercise certain powers given it by its charter, such a corporation will not be obstructed or hindered in the prosecution of those powers, save by some express statutory prohibition denying to it the right to act.

"It is well-settled doctrine that a corporation created in one State may, upon the principle of comity, exercise within any State the general powers conveyed by its own charter and permitted by the law of its own State, provided the doing so be not inconsistent with the laws and public policy of such other State. We need to do no more than make reference to some of the numerous authorities in support of such rule: *Lombard* vs. *Aldrich*, 9 N. M., 31; *State* vs. *B. C. & M. R. R. Co.*, 25 Vt., 433; *White* vs. *Howard*, 38 Conn., 342; *Thompson* vs. *Waters*, 25 Mich., 214; *Thompson* vs. *Swoops*, 44 Bay State, 474;

Lathrop vs. *Commercial Bank of Scioto*, 8 Dana, 114; *Hollis* vs. *Drew Theological Seminary*, 99 N. Y., 466; *Cowell* vs. *Spring Co.*, 100 U. S., 55; *Christian Union* vs. *Yount*, 101 U. S., 352; *Stephens* vs. *Pratt*, 101 Ill., 224.

Female Academy vs. *Sullivan*, (116 Ill., 375).

It cannot be claimed that a prohibition against the exercise of certain rights by *domestic* corporations amounts by implication to a similar prohibition against foreign corporations, upon the theory of some imputed policy of the State.

"If the policy of the State or Territory," as was said in the *Cowell* case, above cited, "does not permit the business of foreign corporations in its limits or allow the corporation to acquire or hold real property, it must be expressed in some *affirmative way*. It cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law.

In the *Female Academy* case, above cited, the Illinois Court said:

"*The public policy of the State is made manifest by its legislature*, and in the solution, then, of the question in hand, we have to look to the laws of this State and see whether they be adverse to a corporation, for the purpose of education, taking and holding land in this State by devise, and if they are found not to be so, then the title of the appellant under the will must be sustained."

In the case of *Vanderpoel* vs. *Gorman* (140 N. Y., 571), where an act was under consideration which had been construed to forbid domestic corporations from making assignments in contemplation of insolvency, and where an attempt was made to include foreign corporations in the prohibition, the Court said:

"As the prohibition is not contained in any statute of the State, we are unable to discover any public policy of the State which would stand in lieu of a positive statute and prohibit our recognition of the validity of this transfer."

These general principles are admitted by appellants in their brief (see page 41, first paragraph).

It is manifest that this Illinois Water Works Company, having, both by common law and by the statute law of the State of its domicile, the power to mortgage, carries that power wherever it goes. The *situs* of its property cannot influence the exercise of its powers. If any restriction existed upon the corporate power to mortgage, that restriction would be leveled against the *corporation* as a *corporation*, and would have for its aim not the protection of real estate, but the compulsion of the corporation in the lines of its alleged public duty. Therefore, the laws of the State where the property is situated could not affect the question. The prohibition would be against the liberty of corporations, not the mortgaging of property. There is no law or policy in Nebraska or any other State forbidding the mortgaging of property. A State may by express terms forbid its domestic corporations from making mortgages, but it cannot forbid foreign corporations from making mortgages.

But the State of Nebraska does not forbid the making of mortgages. On the contrary, reference to its statutes will show that that power is recognized by the Nebraska Legislature.

The laws of Nebraska authorize companies formed under them to contract debts. The general statute for the incorporation of companies does not in so many words authorize them to do so; but the power is implied from the provision that the articles of incorporation "must" fix the highest amount of indebtedness or liability to which the corporation shall at any time be subject" (*Comp. Laws*, 1893, sec. 128, p. 313), and from the provision that "every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, in the nearest newspaper in the State, of the

amount of all the existing debts of the corporation." The same statute authorizes the companies formed under it "to convey lands by deed, sealed by the common seal of said corporation and signed by the president or presiding officer of the board of trustees of the corporation" (sec. 137, p. 314.)

These statutes confer the power to contract debts and convey lands, which implies the power to mortgage. *Whitewater, etc., Co.* vs. *Vallette*, 21 How., 414; *Pennock* vs. *Coe*, 23 How., 117; *Jones* vs. *Guaranty Co.*, 101 U. S., 191.

Moreover the Nebraska statute of 1879, quoted under Point I., authorized the making of these mortgages, as we have already shown.

III.

The mortgages in question have been ratified by both companies, and they are estopped to deny their validity.

The mortgages were executed in 1887. The defendant companies received and retain the proceeds of the bonds, and the property subject to these mortgages was acquired thereby. No default is alleged or shown before January 1, 1892. Therefore, for five years the companies paid the coupons upon these bonds without protest, and by their conduct induced many persons to purchase these bonds; and if the mortgage had been originally unauthorized, by this conduct they have ratified it.

Hotel Co. vs. *Wade*, 97 U. S., 13.
Supervisors vs. *Schenck*, 5 Wall., 372.
County of Clay vs. *Society for Savings*, 104 U. S., 579.
Thornton H. B. Co. vs. *Eickemeyer H. B. Co.*, 90 N. Y., 613.

Memphis R. R. Co. vs. *Dow*, 19 Fed. Rep., 388.
Hackensack Water Co. vs. *DeKay*, 36 N. J. Equity, 548.
Allis vs. *Jones*, 45 Fed. Rep., 148.
Reed's Appeal, 122 Pa. St., 566.
Fidelity Co. vs. *Western Pa. R. R. Co.*, 21 Atlan. Rep., 21.
Wood vs. *Corry Water Works Co.*, 44 Fed. Rep., 146.

Moreover, the City of Omaha has ratified the mortgages in question and is estopped to deny their validity. It has paid its rentals to both companies and has never objected and does not now object.

The New Jersey Company took the property expressly subject to the mortgage and cannot dispute its validity.

Bronson vs. *La Crosse R. R. Co.*, 2 Wall., 283.
Jerome vs. *Carter*, 94 U. S., 374.
Pullan vs. *Cincinnati & Chicago R. R. Co.* 4 Biss., 35.

One who has bought, subject to a mortgage, cannot contest the validity of the mortgage lien.

Jones on Mortgages (4th Ed.), secs. 744, 1491, and cases cited.
Freeman vs. *Auld*, 44 N. Y., 50.

The evidence in this case shows that the fee of the property is in the New Jersey Company. The Illinois Company is in no position, therefore, to object that the mortgage is invalid, as it no longer has any interest in the land upon which the mortgage is a lien. The New Jersey Company, of course, cannot object.

All the property covered by the mortgages was owned by the Illinois Company, none of it was acquired by the New Jersey Company subsequent to the grant by the Illinois Company (Record, p. 228).

In April 1895, in the case of the *Farmers' Loan and Trust Company* against the *Toledo, Ann Arbor and North Michigan Railway Company*, Judges Taft, Ricks and Severens held that an objection by stockholders of a railroad company to that company's mortgages could not be grounded upon the fact that contrary to the Ohio statute the issue of bonds exceeded the outstanding capital stock, where the company had recognized the validity of the mortgages by paying interest on the bonds. For the same reason, it was held that the stockholders were estopped from claiming that the mortgage was never authorized by the directors and stockholders. Judge Taft, in the opinion (67 Fed. R., 49), says, on the first point, after considering the Ohio statute :

" Under these circumstances we do not think that the corporation can be heard to urge section 3287 as a reason for invalidating the bonds by it, and the stockholders who acquiesced in this action for more than three years are equally estopped to make such a defense " (citing some of the authorities cited above).

On the second point he says :

" Whether the meeting was duly called in accordance with the requirements of the statute is immaterial, because the binding effect of the mortgage, and the bonds, have been recognized since its issuance and by the payment of interest upon the indebtedness thus represented for three years. * * * If there was any defect by reason of a want of original authority to issue the bonds and mortgage, it has been cured by subsequent ratification.

The appellants seem somewhat concerned with the maintenance of the dignity of the States of Illinois and Nebraska. They argue that the Illinois corporation was formed for purposes forbidden by the laws of Illinois and with a view of evading the laws of Nebraska. The logical conclusion of this argument would be, if it could be raised by the appellants, that they would argue themselves out of court ; because, if the company was

not properly incorporated and could not take title to the property in Nebraska, then the appellants have no interest whatever in this case. But, fortunately perhaps for themselves and for the bondholders, the questions which they seek to raise are those which can only be raised by the State whose law has been violated. This is the law in Nebraska, both as to domestic and foreign corporations. (*Missouri Land Valley Company* vs. *Bushnell*, 11 Neb., 192; *Carlow* vs. *Aultman*, 28 Neb., 672.) This same principle is also sustained in the Supreme Court of the United States.

Cowell vs. *Springs Company*, 100 U. S., 55;
Christian Union vs. *Yount*, 101 U. S., 352.

What the owners of the City Water Works Company of Omaha did in this case is not a matter which can be held to have offended the dignity of either the State of Illinois or the State of Nebraska. They were possessed of a property in a large and rapidly growing city and the need of improvements was undoubtedly felt. Under the Nebraska charter the corporation of the City Water Works Company could only borrow money to the extent of $400,000. This had already been obtained and the proceeds expended. Other improvements were necessary at once. Under the Nebraska statute the indebtedness could only have been increased by enlarging the stock of the company. It seems to be very doubtful whether such a course would in any event have been expedient. It is not at all certain that such stock could have been sold so as to realize any considerable sum of money. At any rate, the owners of the stock of the City Water Works Company determined to incorporate under the laws of Illinois, where, without increasing the capital stock of the company, it would be possible to borrow money and so make the improvements which were necessary for the carrying on of its business. The stock of the two companies was identical in amount. What was effected was practically a reorganization without the usual attendant

litigation. The stockholders of the new company were almost identical with those of the old.

Some point is made by the appellants in reference to the acquisition of the stock of the City Water Works Company by the new corporation. As we have shown, in the first place, the appellants could not raise that question themselves, and it would not affect the validity of the mortgage in any event; but the testimony of Mr. Venner upon which alone this point is based, does not state distinctly that the American Water Works Company of Illinois ever owned one share of stock of the City Water Works Company. The probabilities are that this stock was bought by Venner and retired. He testifies, on page 185, that the first $1,200,000 of six per cent. bonds, numbered from 1 to 1,200, inclusive, were used in purchasing and paying for stock of the City Water Works Company of Omaha. On page 196 he testifies:

I furnished the money to purchase the stock of the City Water Works Company of Omaha. It is possible that I borrowed money. Most people in my line of business do borrow money at times. The American Water Works Company paid me in its bonds $1,200 for the shares of stock in the City Water Works Company which I advanced to purchase.

The purchase was not made by the Illinois Company, but by Venner, and he was reimbursed out of the proceeds of the first 1,200 bonds. But there is no evidence anywhere that any of the bondholders ever knew of this transaction. The description of the property in the mortgage, which is set out in the bill of complaint in paragraph V., page 4, contains no reference whatever to any stock of the City Water Works Company.

It is evident that the making of the mortgage in the present instance was not to deprive the company of its power to perform its duties to the City of

Omaha and the surrounding districts, but to enable it to perform these duties. On page 21 it is recited in the mortgage that "Whereas, this company has purchased from the City Water Works Company of Omaha, Nebraska, a corporation organized under the laws of the State of Nebraska, all its plant and property and all its interest under the contract between said company and the City of Omaha, by which the said City of Omaha as a municipality is supplied with water." * * * Then follows a recital of the debts of the company, and then the mortgage goes on: "And whereas, in order to comply with the requirements of the contract with the said City of Omaha and provide suitable means and facilities of furnishing water to said City of Omaha and its inhabitants of suitable quality and in suitable quantities it is necessary to expend in the purchase of land and buildings and erecting a new plant," etc., etc., * * * "a large sum of money, estimated at not less than $800,000, all which erections, additions, extensions, enlargements and improvements must be completed within the next eighteen months." Then follow other recitals, showing that the purpose of the mortgage was to provide for the extension of the water works. This is the document that was presented to the bondholders. This is the inducement which the Illinois company held out to the public to persuade them to purchase its bonds. Upon all the doctrines of equity, granting that this contract was *ultra vires*—and we have contended, and do contend, that it was not—this mortgagor corporation would never be allowed to assert that it made this mortgage to deprive itself of the capacity of performing its duties to the City of Omaha.

In the case of the *Atlantic & Pacific R. R. Co.* vs. *Union Pacific Ry. Co. & ano.* (1 Fed Rep., 745), Judge McCrary held, in the Circuit Court for the District of Nebraska, that, although a contract may have been *ultra vires*, a court of equity will restrain a corporation from recovering possession of property which has

passed thereunder without due process of law and a return of the consideration paid; and the Supreme Court of Nebraska has likewise decided, in the case of *Cook* vs. *Kuhn* (1 Neb., 472), that "a corporation which has enjoyed the fruits of a loan which it has authorized to be made, cannot avoid the security which its officer has given until it has done equity by repaying the money loaned."

See also—

Pullman Palace Car Co. vs. *Central Transportation Co.* (65 Fed. Rep., 158).

IV.

No overissue of bonds. If there was, defendants could not raise the point.

On page 67 of his brief appellants' counsel makes the point that the American Water Works Company could not issue bonds in excess of two-thirds of its capital stock because the statutes of Nebraska contain such a provision in reference to domestic corporations.

The mortgagor company was incorporated under the laws of the State of Illinois.

On page 41 of appellants' brief is the statement:

"We do not combat the general rule that a corporation takes it charter powers with it when it goes into another State to do business."

By the laws of Illinois the power of corporations to contract debts is not limited.

The company cannot escape from its obligations because the mortgage debt exceeded two-thirds of its capital, on the ground that corporations organized under the statutes of Nebraska cannot contract debts beyond that amount.

The Nebraska statute (Comp. Stats., 1893, chap. 16, sec. 128), *does not apply to foreign companies* coming there to do business. These companies bring with them all the powers with which they are endowed under the institutions of the State of their creation, and may exercise them there, without regard to what domestic companies can do, unless expressly prohibited by statutes. Their powers are not as limited as those of domestic companies. We have argued this under Point II. In the prosecution of the objects of its creation, had this company, before coming to Nebraska, contracted debts at home within the limit allowed there, but in excess of two-thirds of its capital, the doors of Nebraska would not have been shut against it; and had it, after coming there, contracted debts at home in excess of the limit of Nebraska laws, it would not have been dismissed from that State. Nor is the case different because these mortgages happened to be made on Nebraska property to secure such debts.

As Mr. Chief Justice Waite said in *Relf* vs. *Rundle* (103 U. S., 225): "No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created; every corporation carries its charter wherever it goes, for that is the law of its existence."

But even if the competency of the company were measured by that of domestic corporations, it cannot avoid these debts because they exceed two-thirds of its capital.

If, on the strength of the contract, the parties have changed their positions, the fact that it was an unauthorized exercise of corporate power cannot avoid its obligation.

In such case, another question arises, namely: What, upon a view of the whole statute, appears to have been the intention of the Legislature? Did it

intend to forfeit all that had been invested in the contract?

In *Mining Company* vs. *The National Bank* (96 U. S., 640) the Court said:

"We do not think that public policy requires, or that Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

In *The National Bank* vs. *Matthews* (98 U. S.. 621) the Court said:

"The object of the restriction was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in Mortmain. The intent, not letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error."

See also—

Whitney vs. *Wyman* (101 U. S., 392).

Hays vs. *Galion Gas-light and Coke Co.*, 29 Ohio St., 330, was a bill brought by a trustee to foreclose a mortgage to him. The defense was that the corporation had no power to make the note or mortgage. After pointing out authority to do so conferred by statute, Boynton, *J.*, speaking for the Court, said:

"This conclusion renders unnecessary the consideration of the question of estoppel, which the facts stated give

rise to. It is, however, proper to remark that the defendant, in claiming exemption from corporate liability, and insisting, as it does in argument, that to borrow and give its notes and mortgage to evidence its obligation to pay, are in excess of and beyond its corporate functions and capacity, sets up its own usurpation of power to avoid the payment of what appears to be an honest debt. That this can be done may be well doubted. The rule seems well established that where a contract has been executed, and fully performed, on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company. (Citing several cases.) Where the corporation, in the exercise of apparent power to borrow, secures from another a loan of money on the faith that the power exists, it would be a miscarriage of justice to permit the company to escape liability on the ground that, in the act of borrowing, it transcended the limits of the power granted by its charter; especially would this be so where there is nothing on the face of the paper by which the debt is evidenced, showing the company to have overstepped the boundary line of corporate privilege in the act of borrowing, and where there is no notice of a want of power or capacity to borrow, and the money is loaned and the security taken on the faith of its existence."

See also Judge Taft's opinion in the *Toledo, Ann Arbor and North Michigan* case, 67 Fed. Rep., 49, quoted under preceding point.

The statute of Nebraska providing for incorporations of persons engaged in any lawful business, and limiting the competency of a corporation organized under it to contract debts, had not in view the consequences attributed to it by the defendant. While the State may question the action of a company in contracting debts in excess of the statutory limit, the company will not be heard to allege its usurpation of power to avoid its honest debts. If such were the effect of the statute, the greatest mischief and injustice would follow. The statute would invite parties into illicit dealing instead of warning them against it.

Newburg Petroleum Co. vs. *Weare*, 27 Ohio St., 343, 354.

The Bank of Toledo vs. *The International Bank*, 21 N. Y., 542.
Ellsworth vs. *St. Louis, etc., Co.*, 98 N. Y., 553.
Douglas Co. vs. *Bolles*, 94 U. S., 104.
Close vs. *Cemetery Co.*, 107 U. S., 466, 477.
Hackensack, etc., Co. vs. *DeKay*, 36 N. J. Eq., 548, 559.

The mortgage in this case recites (p. 21) *that*

"THE SAID AMERICAN WATER WORKS IS AUTHORIZED BY LAW TO CONTRACT DEBTS AND BORROW MONEY WITHOUT LIMIT."

Such was the representation made to the public to induce the purchase of the bonds. This declaration was made solemnly under the seal of the company. No court will allow the company now to deny that this statement is true.

We cannot do better, in closing the discussion of this point, than to quote the language of Mr. Justice Brewer in a case brought in the Circuit Court of the United States for the District of Nebraska, *Poole* vs. *West Point Butter and Cheese Association*, 30 Fed. Rep., 520.

The Court says:

"One other matter is suggested, and that is the illegality of the increase of the stock from $25,000 to $250,000, and the limitations both in the statutes of Nebraska and in the charter of the company against the amount of indebtedness. The complainants hold only stock which was thus irregularly issued, and I do not think it lies in their mouth, or, indeed, in the mouth of any of the original stockholders cognizant of the fact, and assenting thereto, to question the liability of the corporation for the entire debt created in favor of the Middletown Bank. *No man can plead his own wrong to defeat an honest debt.* I shall therefore have to find against the claim of the complainant to priority of payment over the cross-complainant."

V.

Sundry Minor Points.

As to the point that holders of bonds are not purchasers for value without notice.

The original answers raise no issue as to the validity of the outstanding bonds. The bill alleges specifically (paragraph XIX.) that "a large number of said bonds, aggregating a very large sum of money are outstanding existing obligations on the part of the mortgagor company." This allegation of the bill is not denied in the answers. But after all the testimony had been taken by the complainant, the appellants filed an amendment to their answer (page 204) which set up certain specific defences. First, the incapacity of the company to make any mortgage at all, because there was already a mortgage of $400,000 upon the plant; second, that the stockholders and directors did not authorize the mortgage, and that the franchises and privileges granted by the City of Omaha could not be mortgaged; third, that the mortgagor company had not complied with certain laws of the State of Nebraska; fourth, that the organization of the American Water Works Company was illegal; that the same was promoted and organized as a scheme or device to evade the policy of the laws of the State of Nebraska, etc. Then follows an allegation in the same paragraph 4, "of all which facts the complainant herein and the bondholders by the terms of the said mortgage were bound to have had notice and did in fact have notice, and that said bonds were not sold and delivered to *bona fide* holders for value."

Under all reasonable construction of pleadings, this allegation with reference to the bondholders being *bona fide* holders for value must be held to be limited by the allegations immediately preceding, and read in connection with that, simply means that the bondholders had notice of the defects mentioned. It is not an allegation that the bonds were not sold *to holders for value*, but *to bona fide*

holders for value. The emphasis is on the words *bona fide.* The holders might hold for value, but they are not *bona fide,* as they know the defects alleged. We do not believe that at such a late day the Court will allow defendants, by the insertion of an important allegation in so obscure a place, to raise the whole question of the ownership of the bonds.

But there is enough in this case to hold that the bondholders are holders for value. In the stipulation (page 210, paragraph 4), "It is further agreed that Venner negotiated and sold a large part of the bonds in controversy; that both the New Jersey and the Illinois companies have paid large sums of interest on said bonds." Now, it appears in the evidence that $3,150,000 of the bonds were delivered to C. H. Venner & Company, and the reasonable interpretation of this stipulation is, that Venner sold the bonds which were delivered to him. He was examined as a witness in this cause, and, although cross-examined at length as to the ownership of bonds, made no statement whatever as to any alleged ownership on his own part, so that a fair inference is that he had parted with all the bonds that were delivered to him and parted with them for value. The other bonds were delivered to persons entirely outside of the companies. The statement of deliveries will be found on page 167.

The supplemental mortgage recites that the mortgagor company "in the sale of such of its bonds as have heretofore been issued and sold has realized gold prices for the same" (Record, p. 48). On page 49 this mortgage recites a resolution directing the trustee "to cause upon request of the holders of the bonds of this company, heretofore issued and sold, numbered from number one to number sixteen hundred, both inclusive," etc., etc.

The deed by the Illinois company to the New Jersey company, dated April 24, 1891, in the covenant against incumbrances expressly excepts "also a certain mortgage to secure four million (4,000,000) dollars of bonds, made by said first party, to said Trust Company above mentioned,

bearing date July 1, 1887, of which said four millions so bonds three million six hundred thousand have been issued and are outstanding" (Record, p. 237). This deed was made almost a year after the last certification and delivery of bonds by the Trust Company (Record, p. 167).

Further than this, in the answer of the defendant companies it is alleged affirmatively (Record, p. 79) that "the coupons maturing January 1, 1892, amounted to the sum of $98,000, and of which sum only $41,279 are outstanding." Again, "of the $98,000 of coupons maturing July 1, 1892, there are only $48,000 outstanding." "Of the coupons maturing January 1, 1893, only $22,500 were outstanding." "Of the coupons maturing July 1, 1893, $32,000 have been purchased and are now controlled by persons who have waived default," etc. Then the allegation follows "that the whole amount of outstanding unpaid coupons is $209,775 prior to January 1, 1894, * * * and that the whole amount of overdue coupons controlled by the Farmers' Loan and Trust Company, complainant, is less than one-half of all the overdue coupons outstanding."

Here is a distinct recognition in the answers of the defendants of the validity of the outstanding coupons and consequently of the bonds from which they are detached, an allegation of the amount of the outstanding coupons of each due date and the total amount, $98,000. This last figure is made up of the interest on 1,600 six per cent. bonds and 2,000 five per cent. bonds, making the total issue 3,600.

The testimony for the complainant shows that $3,509,000 in amount of the bonds were in the hands of complainant (p. 171), deposited by the reorganization committee, and specimens of each of the several kinds of bonds were offered in evidence (p. 180). The production of a negotiable instrument creates a presumption that the holder of it has acquired it in regular course of business before maturity, without knowledge of any defects, and for a valuable consideration.

Justice Story, in the case of *Swift* vs. *Tyson* (16, Pet. 1), says at page 16:

As little doubt is there, that the holder of any negotiable paper before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defense satisfactory proofs of the contrary and thus to overcome the *prima facie* of title of the plaintiff."

Again, in *Chambers County* vs. *Clews* (21 Wall.), at page 323, Justice Hunt says:

"The logical and orderly mode of a trial where it was intended to investigate the issue we have been considering, would be this: to sustain their claim, the plaintiffs produce the bonds and coupons. The execution not being put in issue, this establishes the plaintiffs' case and establishes affirmatively that they are holders for value before maturity, without notice."

Moreover, Mr. Venner was examined at length as to the outstanding coupons, and he stated that there were $3,600,000 bonds outstanding purporting to be secured by the mortgage. He enumerated in detail the amounts of coupons which were outstanding, all of which he acknowledged were valid, and he is the witness of the defendants. We think, therefore, that there is sufficient evidence in the case to justify a finding that the holders of the bonds are holders for value.

The negotiability of the bonds.

The appellants have raised a simple quibble as to the negotiability of the bonds in question. Of course, the negotiability of the bonds is unimportant unless some defect is shown in the mortgage or in the authority to issue the bonds, and even then, under the authorities, the defense of *ultra vires* could not avail as

against the bondholders unless they have actual knowledge of the fact that the corporation had exceeded its powers. The point made is that the fact that certain of the bonds were to be held by the Trust Company for certain purposes, and that the company reserved the right to reduce the rate of interest when certain other of the bonds were issued, renders them non-negotiable. In reference to the latter consideration, the counsel for the appellants argues that we do not know when the change in the rate of interest on the bond was to be made, it might be made after the bonds were issued. Of course, this is pure and simple nonsense. On the face of the bonds it says that the American Water Works Company preserves the right, when the said $2,000,000 of bonds *are issued*, to reduce the rate of interest, and the mortgage provides for the way in which this is to be done (7th clause, p. 30); so there could at no time be any uncertainty as to the rate of interest which the bonds should bear, because the rate of interest would be stamped upon the bonds and also upon the coupons. Samples of these bonds were offered in evidence (p. 180).

Provisions of decree in reference to payment of purchase price and redemption.

The appellants have presented three alleged errors in the provisions of the decree. One is the provision requiring the purchase price to be paid in gold coin, the second the provisions of the decree in reference to the payment in bonds, and the third the provision about redemption.

In reference to these provisions we would say that if there be any error it is not matter for a reversal but for a modification of the decree in reference to the points complained of.

It is an all-sufficient answer, however, to appellants' contention here, that the decree was submitted to the counsel for appellants and the form of it approved by him. See page 281 of record, where the counsel has signed his name after the words "O. K. as to form." Having consented to the form of the decree, and the matter in question not being subject matter that would be presented to the consideration of the Court, under the pleadings, we believe that the only remedy for the correction of any error, if there be any, would be by a motion addressed to the lower Court for leave to withdraw the stipulation and to change the decree in reference to the words complained of. We do not care to take the time of the Court in discussing the question whether the bids should be paid for in gold coin or other legal tender, because legal tender of the United States, which alone a master could be forced to take, would be convertible into gold coin of the United States.

In reference to the provision about answering bids in bonds, we would suggest that the counsel for appellants has not entirely mastered the provisions of the decree. It is true that all persons except the plaintiff are required to pay their bids in gold coin of the United States. It might be suggested, however, that this concerns the bondholders only, and that as the plaintiff represents the bondholders whatever rights the plaintiff has are also rights which belong to the bondholders, and if the plaintiff has been at all derelict in its duties it is responsible to the bondholders. It is, however, not a fair construction of the decree that the bonds presented to the plaintiff are to be taken at their par value. In the first place, the bondholders requesting the plaintiff to bid "shall make provision to its satisfaction for the payment in cash of all expenses incurred in the execution of the trust declared in the two mortgages, copies of which are attached to the bill, and the proportion of such sum as may be payable to bondholders not joining in the said request."

And further:

"The *remaining* part of the plaintiff's said bid shall be paid in gold coin of the United States of present standard of fineness."

The decree furthermore contemplates the providing of a sufficient fund for the payment of the expenses of the litigation and also the *pro rata* share of the non-participating bondholders in the proceeds of the sale. No limit is placed upon the bondholders who may join in the request to the plaintiff to purchase the property. Anyone who serves upon the plaintiff the written notice, and performs the other provisions of the decree on his part to be performed, shall be entitled to the benefits of the decree. The only requirement is that the plaintiff shall not act until the holders of at least a majority of the bonds shall request it to act, which is a reasonable provision. If a less number of bondholders purchase the property and pay the deposit required, upon the property being struck off to them, they would be in a position to apply to the Court for leave to use their bonds in the purchase, a privilege which would undoubtedly be granted to them in any event. This is a matter which does not concern the defendant companies. They are furthermore bound by their stipulation approving the form of the decree.

As the amount to be paid upon redemption and the time allowed.

The *Chicago and Vincennes R. R. Co.* case, 106 U. S., 47, cited upon appellant's brief, was one in which the Court held that the provisions of the mortgage had not been complied with so as to accelerate the maturity of the principal and that a foreclosure for the interest only on the mortgage could be had. This is not true in the case at bar. The mortgage provides, page 33, "the said second party (the Trustee) may at its option in case such default, neglect, refusal or failure shall extend

for the period of ninety days, declare the whole sum, principal and accrued interest, evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default." See also last clause of paragraph 6th of mortgage (p. 35). It will be seen that nothing more is required in the mortgage herein foreclosed than the expiration of ninety days from the time default occurs in order that the entire principal and interest may be at once due. In the *Chicago & Vincennes* case certain other requirements had to be complied with.

As to the time for redemption, the Nebraska Statute does not provide for any period of redemption in similar cases, but grants to the mortgagor a stay after decree is entered, provided an application is made for such a stay within twenty days after the entry of the decree (Compiled Statutes of Neb., 1895, page 1210, section 6058, sec. 477*b* Code of Civil Procedure).

The language in the *Chicago and Vincennes* case is as follows:

"Where, according to the English practice, a sale, instead of foreclosure, was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties. 2 Daniell, Ch. Pr. 1266.

The case of *Clark* vs. *Reyburn*, 8 Wall, 318, was a case of strict foreclosure, and has nothing to do with the case of a foreclosure by sale.

Receiver Clarkson was not entitled as of right to answer.

Clarkson was appointed ancillary receiver in a judgment creditor's action. The original action was brought in the State of Illinois for a dissolution of the Illinois corporation. Clarkson was thereafter appointed

ancillary receiver by the Circuit Court of the United States for the District of Nebraska. He applied to that same Court, on the day of the final hearing, for leave to file an answer, and the Court refused his request. He is the hand of the Court, and his only duty is to obey its mandates. He has no right to appeal from an order refusing to allow him to file an answer.

People vs. *St. Nicholas Bank*, 77 Hun, 176.

The receiver came into the case as the successor to the Illinois corporation, and was bo[illegible] in the condition in which it existe[illegible] appointment. It could not be exp[illegible] was ready for final hearing and [illegible] he should be allowed to interpose [illegible] evidence upon a question which had already been thoroughly litigated by the party whom he represented. Upon his intervention he stood in a position somewhat equivalent to the position in which he would have stood if a bill of revivor had been filed by the complainant. A bill of revivor is not a commencement of a new suit, but a continuance of the old one.

Clarke vs. *Mathewson*, 12 Pet., 164.

It was discretionary with the Court to allow him to file his answer. His assignment of errors is the same with that of the defendant companies and all the questions he desired to present had already been thoroughly litigated. The Court properly refused him this permission.

Conclusion.

In conclusion we would quote the language of Judge Wallace, in the case of *Memphis & L. R. R. Co.* vs. *Dow* (19 Fed. Rep., 394), referring to a different state

for the period of ninety days, declare the whole sum, principal and accrued interest, evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default." See also last clause of paragraph 6th of mortgage (p. 35). It will be seen that nothing more is required in the mortgage herein foreclosed than the expiration of ninety days from the time default occurs in order that the entire principal and interest may be at once due. In the *Chicago & Vincennes* case certain other requirements had to be complied with.

As to the time for redemption, the Nebraska Statute does not provide for any period of redemption in similar cases, but grants to the mortgagor a stay after decree is entered, provided an application is made for such a stay within twenty days after the entry of the decree (Compiled Statutes of Neb., 1895, page 1210, section 6058, sec. 477*b* Code of Civil Procedure).

The language in the *Chicago and Vincennes* case is as follows:

"Where, according to the English practice, a sale, instead of foreclosure, was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties. 2 Daniell, Ch. Pr. 1266.

The case of *Clark* vs. *Reyburn*, 8 Wall, 318, was a case of strict foreclosure, and has nothing to do with the case of a foreclosure by sale.

Receiver Clarkson was not entitled as of right to answer.

Clarkson was appointed ancillary receiver in a judgment creditor's action. The original action was brought in the State of Illinois for a dissolution of the Illinois corporation. Clarkson was thereafter appointed

ancillary receiver by the Circuit Court of the United States for the District of Nebraska. He applied to that same Court, ~~on the day~~ after the final hearing, for leave to file an answer, and the Court refused his request. He is the hand of the Court, and his only duty is to obey its mandates. He has no right to appeal from an order refusing to allow him to file an answer.

People vs. *St. Nicholas Bank*, 77 Hun, 176.

The receiver came into the case as the successor to the Illinois corporation, and was bound to take the case in the condition in which it existed at the time of his appointment. It could not be expected, ~~when the case was ready for final hearing and on the calendar,~~ that he should be allowed to interpose a long answer and take evidence upon a question which had already been thoroughly litigated by the party whom he represented. Upon his intervention he stood in a position somewhat equivalent to the position in which he would have stood if a bill of revivor had been filed by the complainant. A bill of revivor is not a commencement of a new suit, but a continuance of the old one.

Clarke vs. *Mathewson*, 12 Pet., 164.

It was discretionary with the Court to allow him to file his answer. His assignment of errors is the same with that of the defendant companies and all the questions he desired to present had already been thoroughly litigated. The Court properly refused him this permission.

Conclusion.

In conclusion we would quote the language of Judge Wallace, in the case of *Memphis & L. R. R. Co.* vs. *Dow* (19 Fed. Rep., 394), referring to a different state

of facts; but equally applicable to the present suit. He says:

"The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligations without offering to return the property it acquired by its authorized contracts with them (the bondholders). The fundamental maxim is that he who seeks equity must do equity."

The decree should be affirmed.

R. S. HALL,
J. M. WOOLWORTH,
DAVID MCCLURE,
Of Counsel for Appellee.

Opinion.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 715.—December Term, A. D. 1895.

The American Water Works Company of Illinois and the American Water Works Company of New Jersey, Appellants, *vs.* The Farmers' Loan and Trust Company, Appellee.	Appeal from the Circuit Court of the United States for the District of Nebraska.

No. 716.—December Term, A. D. 1895.

Thaddeus S. Clarkson, Receiver of The American Water Works Company, a Corporation of the State of Illinois, Appellant, *vs.* The Farmers' Loan and Trust Company, Appellee.	Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. John L. Webster for the Appellants.

Mr. J. M. Woolworth and Mr. David McClure (Mr. R. S. Hall was with them on brief) for the Appellee.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

Statement.

The suit out of which these appeals arise was brought by the Farmers' Loan & Trust Company, the appellee, to foreclose an original and a supplemental mortgage on a certain Water Works plant situated in the City of Omaha, Nebraska, which were given to secure the payment of an issue of negotiable bonds to the amount of four million dollars, that were executed by the American Water Works Company, a corporation of the State of Illinois. The action was brought originally against the appellants, The American Water Works Company of Illinois, and against a corporation of the same name, to wit: the American Water Works Company, a corporation organized under the laws of the State of New Jersey. E. Hyde Rust, as suspended Receiver of the American Water Works Company of New Jersey, and Alonzo B. Hunt, as temporary Receiver of the same company, were also named as parties defendant to the original bill. The defendant-companies filed a joint answer to the bill of complaint, and subsequently an amended answer, wherein they set up various defenses to the suit. After the taking of considerable testimony by both parties, a trial was had which resulted in a decree of foreclosure, directing a sale of the mortgaged property for the satisfaction and payment of the mortgage debt. From that decree the two defendant-companies, to wit: The American Water Works Company of Illinois and the American Water Works Company of New Jersey, have appealed.

During the pendency of the suit at bar, an action was commenced in the Circuit Court of Cook County, Illinois, against the appellant, The American Water Works Company of Illinois, to wind up the affairs of that company on the ground of its insolvency. In that proceeding Francis B. Peabody was appointed Receiver of the property and effects of the insolvent corporation, and thereafter

by an order made on May 2, 1895, by the Circuit Court of the United States for the District of Nebraska, Thaddeus S. Clarkson, the appellant, was appointed ancillary Receiver of said company for the District of Nebraska. After the final hearing of the suit at bar to foreclose the aforesaid mortgages, and on the day that the final decree therein appears to have been entered, said Thaddeus S. Clarkson in his capacity as ancillary Receiver of the American Water Works Company of Illinois, asked leave to file an answer to the bill of complaint, which application was, by the Circuit Court refused. From the order thus made denying his application to file an answer to the bill of complaint, the Receiver has also prosecuted an appeal. Both of said appeals are before this Court for consideration upon the same record.

THAYER, J., after stating the case as above, delivered the opinion of the Court:

The important questions which arise on these appeals will be best explained and understood by a succinct statement of the facts and circumstances that gave rise to the litigation. In the year 1880 the City of Omaha, being a city of the first class, was authorized by a general law of the State of Nebraska regulating the organization and defining the powers of cities of the first class, "To erect, construct and maintain Water Works either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such Water Works, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of such Water Works; * * * and, * * * to *contract with and procure individuals or corporations*

to construct and maintain Water Works on such terms and under such regulations as may be agreed on." Laws of Nebraska, 1879, pages 95 and 99. The power thus conferred upon the city was exercised by its Mayor and Council by an ordinance passed on June 11, 1880, which was subsequently amended, entitled: "An ordinance to authorize and procure the construction and maintenance of Water Works in the City of Omaha, State of Nebraska." The first section of this ordinance was as follows: "Sec. 1. Any person, company, corporation or association who shall erect, construct and maintain Water Works upon the principle of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described, and as more fully and at large appears in the report and Appendix Tables of J. D. Cook, Engineer, filed in the office of the City Clerk of the City of Omaha, on the 25th and 31st days of May, A. D. 1880, and as finally approved by the City Council of said city on the 8th of June, A. D. 1880, within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof for domestic, mechanical public and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares, and public places of said city for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company, corporation or association, or their assigns, shall maintain and operate any such Water Works, and while constructing the same, upon the terms and conditions hereinafter mentioned."

The succeeding sections of said ordinance specified the sources from which the water supply for the city should be drawn, the size and location of reservoirs to be erected, the capacity of the pumping machinery to be employed, the size of the water mains and pipes, the general location thereof, the

number of fire hydrants to be erected, the tariff of rates to be charged for supplying water both to public and private consumers, and many other details of construction and operation unnecessary to be mentioned. The 12th section of the ordinance provided, in substance, that proposals should be invited and received by the city for furnishing the city with water for the period of twenty-five years from the date of the completion of the plant by means of a water works plant that was to be constructed and operated in conformity with the provisions of the ordinance. The final section of the ordinance reserved to the municipality the right to purchase the plant that might be thus constructed, at a valuation to be fixed by arbitration, at any time after the expiration of twenty years. In pursuance of the provisions of the aforesaid ordinance, a contract was entered into between the City of Omaha and one Sidney E. Locke, on July 20, 1880, whereby the latter person secured the right to construct and maintain water works, and to furnish water to the City of Omaha for public and private use for the term of twenty-five years from the completion of the works. On July 20, 1880, the aforesaid contract was assigned by Locke to the City Water Works Company of Omaha, a corporation of the State of Nebraska. The latter company completed the works in accordance with the provisions of the contract, and the plant when completed was duly accepted by the city. On August 2, 1880, the City Water Works Company executed a mortgage on the Water Works plant, then in process of construction, to secure an issue of bonds to the amount of four hundred thousand dollars which are still outstanding.

On or about April 1, 1887, The American Water Works Company of Illinois, one of the appellants, purchased the plant now in controversy from the City Water Works Company of Omaha, and subsequently, on July 1, 1887, and on January 16,

1889, it executed the two mortgages or deeds of trust to the Farmers' Loan & Trust Company, as trustee, which it seeks to have foreclosed. These mortgages respectively contained, in substance, the following recitals, to wit: that the mortgagor company (The American Water Works Company of Illinois), was duly authorized to build, equip and operate Water Works for the purpose of supplying water to cities, towns and villages and other municipal corporations; that it had purchased from the City Water Works Company of Omaha, the Water Works plant and real estate connected therewith, by means of which the City of Omaha and its inhabitants were supplied with water for fire and other purposes, including the contract with the city under which the City Water Works Company was engaged in furnishing water to said city, and including also all contracts with private consumers; that by the terms of its purchase of said Water Works plant, it had agreed to assume the bonded debt of said City Works Company, and in addition to said bonded debt, to assume and pay all other indebtedness of said City Water Works Company; that the mortgagor company deemed it essential and necessary to the successful maintenance and operation of said works to make extensive improvements upon and additions to said Water Works plant, for the purpose of enabling it to comply with the increased demand made upon it for water, arising from the rapid growth of the City of Omaha; that it was vested with the power under its charter, of contracting debts and borrowing money, and that it had been authorized by a resolution duly passed by its Board of Directors on June 30, 1887, to issue bonds to the amount of four million dollars, and to secure the same by a mortgage on its Omaha property, and by pledging its income and resources for the payment thereof.

Said mortgages contained a further recital, to the effect, that by virtue of the aforesaid resolution

of the Board of Directors of the American Water Works Company of Illinois, the proceeds of the bonds authorized to be issued were to be appropriated and used as follows : $800,000 for the purpose of extending, enlarging and improving the Water Works plant of the City of Omaha that had been purchased ; $1,700,000 for the purpose of paying the purchase price for said works and to extinguish the bonded and other indebtedness of the City Water Works Company that had been assumed by the purchasing company ; and the residue, $1,500,000, for the purpose of enlarging and improving the works in future, as occasion might require.

Contemporaneously with the execution and delivery of the aforesaid mortgage, or deed of trust dated July 1, 1887, and prior to the execution of the supplemental mortgage dated January 16, 1889, The American Water Works Company of Illinois executed and deposited with the appellee. The Farmers' Loan & Trust Company, four thousand negotiable bonds amounting in the aggregate to four million dollars. By the terms of the mortgage given to secure the same, bonds to the amount of $1,600,000 were to be delivered forthwith by the Farmers' Loan & Trust Company to any person or persons who presented to it written orders for the delivery of bonds signed by the President and Secretary of the mortgagor company. Bonds to the amount of $400,000 were to be retained by said Trust Company for the purpose of retiring the outstanding bonds to the same amount, that had been executed by the City Water Works Company of Omaha. The residue of the bonds were to be held in trust and delivered from time to time by said Trust Company under certain terms and conditions specified in said mortgage, which for present purposes need not be stated. It will suffice to say that the Circuit Court found and decreed that the Farmers' Loan & Trust Company had duly certified and put in circulation, in accordance with the pro-

visions of the mortgage, bonds to the amount of $3,600,000, and it was stipulated by the parties in the progress of the trial that "a large part of the bonds in controversy had been negotiated and sold by C. H. Venner," who was a director of the American Water Works Company and was the chief manager of its financial affairs. This stipulation must be held to imply that the bulk of the entire issue of bonds, all of them perhaps except bonds to the amount of $400,000, that are still held by the Trust Company to retire the outstanding bonds of the City Water Works Company of Omaha, were sold for value in the open market, to purchasers who had no notice of any of the facts attending the issuance of the bonds, except such as were disclosed by the recitals contained in the mortgages securing the same.

The American Water Works Company of Illinois took possession of the Water Works now in controversy shortly after it acquired the same by purchase from the City Water Works Company of Omaha, to wit: in April, 1887, and continued to operate the works with the full knowledge and consent of the City of Omaha, until about the 24th day of April, 1891. In the meantime the City of Omaha made payments to the vendee company for water supplied to the city for fire and hydrant purposes, and made such payments at the time and at the rate agreed upon in the original contract between itself and the said Sidney E. Locke; and in all other respects it appears to have recognized the American Water Works Company of Illinois, as the legitimate owner and assignee of the Water Works, and of all rights, privileges and franchises incident thereto that were originally acquired by said Locke, by virtue of his contract with the City of Omaha. In the meantime, also, The American Water Works Company of Illinois paid the interest on such of its bonds, dated July 1, 1887, as had been certified and put into circulation by the Farmers' Loan & Trust Company, pursuant to the

provisions of the aforesaid mortgage or deed of trust.

On April 24, 1891, The American Water Works Company sold and conveyed its entire Water Works plant situated in the City of Omaha, and all the real estate, rights and privileges connected therewith, to its namesake, the American Water Works Company of New Jersey, which last named company thereafter operated the works and supplied water to the city of Omaha at the rate agreed upon in the contract between the city and said Sidney E. Locke; it also paid the interest on the bonds now in controversy as they matured until January 1, 1892. The deed by which the property was thus conveyed by the Illinois Company to the New Jersey Company, described the outstanding incumbrances existing thereon, to wit: the aforesaid incumbrances for $400,000 and $4,000,000 respectively, and expressly declared that the property was conveyed to the grantee company "*subject to said incumbrances.*"

In view of the foregoing facts, The American Water Works Company of Illinois and the American Water Works Company of New Jersey, which for convenience will be hereafter termed respectively the Illinois Company and the New Jersey Company, now contend that the mortgages sought to be foreclosed are invalid for want of authority on the part of the Illinois Company to execute the same. This was the principal, if not the sole defense pleaded in the several answers to the bill of complaint. In other words, while it was recited, in substance, in the mortgages now sought to be foreclosed, as heretofore shown, that they were executed by the Illinois Company for the express purpose, among others, of enabling it to obtain money by the sale of its bonds to pay for the mortgaged property, and to alter, extend and improve the same and render it more valuable and serviceable, it is now claimed by the mortgagor company, and

by its successor in interest, the New Jersey Company, that the mortgages were and are void ; that the New Jersey company is entitled to hold the mortgaged property, discharged from the lien thereof, and that the defense of *ultra vires* may be successfully pleaded both by it and by the Illinois Company, in a suit to foreclose the mortgages, without paying or offering to pay the whole or any part of the outstanding bonds thereby secured. The defense thus interposed does not commend itself to the favorable consideration of a court of equity, and unless it is clearly sustained by authority, which this Court is bound to recognize and follow, it should be overruled. A number of authorities have been invoked by counsel for the appellants in support of the defense which is interposed, but, in our judgment, none of them, when fairly applied to the case in hand, are sufficient to justify a decision that the mortgages are void, and for that reason are not enforceable against the defendant companies. The New Jersey Company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois Company, by virtue of the well-established rule, that a purchaser of property who accepts a conveyance thereof, which describes incumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances. One who thus buys property has no right to challenge the validity of a mortgage lien existing thereon at a date of his purchase, which his grantor, by the terms of his conveyance did not see fit to challenge, but recognized in the most formal manner by declaring that he conveyed the property subject to the existing lien. Whether such mortgage is valid or otherwise is no concern of the purchaser, for in contemplation of law he only acquires an equity of redemption in the property conveyed to him, that is to say, a right to discharge the mortgage debt,

and it would be a breach of good faith, having purchased this right and nothing more, to deny the validity of the incumbrance and seek to avoid the payment thereof on that ground. As between the grantor and grantee in a conveyance made subject to an existing mortgage, the amount of the incumbrance should be regarded as a part of the purchase price left unpaid at the date of the conveyance which the grantee undertakes to pay. At all events, he impliedly agrees not to challenge the validity of incumbrance. The authorities to this point are amply sufficient, in our opinion, to preclude the New Jersey Company from defending against the foreclosure on the ground that the mortgages are invalid. *Freeman* vs. *Auld*, 44 N. Y., 50; *Johnson* vs. *Thompson*, 129 Mass., 398; *Ritter* vs. *Phillips, et al.*, 53 N. Y., 586; *De Wolf* vs. *Johnson*, 10 Wheat., 367; *Calkins* vs. *Copley*, 29 Minn., 471; *Shufelt* vs. *Shufelt*, 9 Paige, 137, 145; Jones on Mortgages (4th Ed.) Secs. 744, 1491, and cases there cited.

It is also apparent, we think, that the Illinois Company has no such present interest in the mortgaged property as should entitle it to resist a foreclosure sale of the property for the purpose of paying its outstanding bonds. Long before this suit was brought, the Illinois Company had sold its plant situated in the city of Omaha, and had made a conveyance thereof to its grantee, subject to the mortgages thereon, which are now in controversy. So far as the present record shows, it entered into no engagement with its grantee to pay any portion of the mortgage debt, but by the form of its deed devolved that duty upon the grantee and expressly declined to assume any such obligation. It would seem, therefore, that a sale of the mortgaged property for the payment of the mortgage debt will inure to the advantage of the mortgagor company, rather than to its disadvantage, for whether the mortgages by it executed did or did not create a valid lien on the property therein

described and conveyed, it certainly cannot be denied that the mortgagor is liable on the outstanding bonds, by the sale of which it has realized a large sum of money which it has appropriated to its own use and benefit. It is clearly liable on its bonds to the purchasers thereof, even though it had no power to execute the mortgages, and it will be relieved of this liability to the extent that such bonds are extinguished and paid by the proceeds of the sale of the mortgaged property. For this reason, that is to say, because it had parted with all interest in the mortgaged property, and is not bound by the terms of any contract or covenant to protect its grantee from a foreclosure sale, and in contemplation of law will be benefitted by such sale, it should not be heard to allege as against the bondholders, that it executed the mortgages without authority.

On the argument of the case it was suggested that the Illinois Company was without power under its charter to execute mortgages on any real property that it might own or acquire; and with much force it was contended that the property covered by the mortgages now in question was of such a character, being a Water Works plant designed for public use and convenience, that it was not susceptible of being sold, assigned or mortgaged without express authority derived under the laws of the State of Nebraska, where the property is located. The first of these contentions is clearly untenable. The American Water Works Company of Illinois was organized under a general incorporation law of the State of Illinois, the first section of which provides: "That corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money." The fifth section of the same act, which enumerates the powers that corporations formed thereunder may exercise, provides among other things that: "They

may borrow money at legal rates of interest and pledge their property, both real and personal, to secure the payment thereof; and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." Rev. Stat. of Illinois, Cothran's Annotated Ed., ch. 32, Secs. 1 and 5. The powers thus conferred on the Illinois Company by the laws of Illinois, it carried with it into the State of Nebraska, and was privileged to there exercise, unless it was prohibited from so doing by the provisions of some local law or the public policy of that State. *Cowell* vs. *Springs Co.*, 100 U. S., 55, 59; *Female Academy* vs. *Sullivan et al.*, 116 Ill., 375. And no law of the State of Nebraska has been cited which, in our judgment, deprived the Illinois Company of its right to exercise within the State of Nebraska its charter power to mortgage real estate by it owned and there situated.

With respect to the second contention of counsel above stated, it is sufficient to say that the charter power of the city of Omaha heretofore quoted authorized it: "to contract with and procure indidiuiduals or corporations to construct and maintain Water Works, *under such terms and under such regulations as may be agreed on.*" Acting under that power, it seems evident that the city was authorized to agree with anyone who undertook to construct and maintain Water Works for its benefit, that he should have the right to assign his contract or to sell or mortgage the plant, or that the assignee or purchaser should succeed to all the rights and privileges of the original contractor. The legislature saw fit to invest the city with full power and discretion to determine whether the person or corporation with whom it might enter into an agreement for the construction and maintainance of Water Works, should be permitted to mortgage the plant and franchises incident thereto, or whether he should be denied that privilege. It was probably thought that the person or

company who might undertake to construct an extensive system of Water Works for a growing city like the city of Omaha, would find it necessary to borrow money to complete the works, and to secure the loan by a mortgage on the plant and franchises, and that the city might deem it advisable to confer that privilege. It accordingly left the city at full liberty to enter into such an agreement with the contractor and to grant such rights and privileges as it deemed advisable. Inasmuch, then, as the municipality was authorized by the general laws of the State to permit or to ratify the execution of an incumbrance covering the Water Works property and franchises, if the City of Omaha does not see fit to challenge the right of the Illinois Company to execute the mortgages now in controversy, it is not apparent that the mortgagor company has the right to raise that question. The City of Omaha has not hitherto questioned the validity of the incumbrances, and it is not a party to the suit, nor in anywise concerned in the present controversy. Moreover, it has hitherto, for a long period of time recognized the assignability of the contract under and by virtue of which the Water Works plant was constructed, by paying hydrant rentals to the successive assignees according to the provisions of the contract, and by permitting them as assignees, to exercise the franchises thereby granted to the original contractor. For this reason we do not deem it necessary or material, on the present occasion, to decide whether by the terms of the contract between the City of Omaha and Sidney E. Locke, or whether by the provisions of the ordinance on which that contract was based, the city did in fact expressly authorize the execution of an incumbrance covering the Water Works plant that was to be constructed. That is a question, we think, which on the present record, the mortgagor company is not privileged to raise, and should not be permitted to raise.

Besides the points already discussed, the appel-

lants indulge in some criticism of various provisions of the decree. It is claimed, in substance, that the decree of foreclosure and sale, as heretofore entered, permits the appellee, The Farmers' Loan & Trust Company, in case it becomes a purchaser at the foreclosure sale, to pay the amount of its bid, in bonds at their par value, without reference to the price bid for the property, and that the decree also denies the right of other purchasers to answer their bids in bonds. If such is the proper construction of the provisions of the decree, and some paragraphs thereof doubtless give color to that construction, it should be corrected before a sale takes place. Bonds should not be received from any purchaser in payment of his bid, except for such proportion of the sum bid as the purchaser, on a distribution of the purchase money, shall be entitled to receive out of the purchase price, on account of the bonds by him held and tendered in payment of his bid. In other words, bonds should not be received at par in payment of a bid unless the purchase price is adequate to pay the par value of all outstanding bonds. Moreover, the right to answer a bid in bonds should not be limited to a particular bondholder, but should be extended to all bondholders on the same terms.

Counsel for the appellee have conceded that the provision in the decree requiring so much of the purchase price as is not paid in bonds to be paid "in gold coin of the United States of the present standard of fineness" may result in some inconvenience and hardship to bidders, and that it is an unnecessary provision. As we understand, they consent that this clause may be expunged from the decree so as to permit payment to be made in whatever kind of money is recognized as a legal tender by the laws of the United States.

We also observe, although the point was not made in the argument, that the provisions in the existing decree relative to the place of sale and mode of advertisement are not such as will satisfy

the requirements of the Act of Congress in that behalf, enacted on March 3, 1893, 27 Stat., 751, ch. 225.

In view of the aforesaid defects and uncertainties in the existing decree, it will be modified by this Court without remanding the case by adding thereto the following provisions, to-wit:

"All sums of money required to be paid under the provisions of this decree shall be paid in legal tender money of the United States; but the plaintiff or any other bidder at the sale herein provided for may answer his bid with the bonds or coupons heretofore mentioned which shall be received in payment of such bid for an amount equal to the sum of money which the holder of said bonds or coupons so tendered would be entitled to receive on account thereof on the distribution of the purchase price bid at such sale Said sale shall be made at the Court House of the County of Douglas, in the State of Nebraska, that being the county in which the property to be sold is situated. Notice of such sale shall be published once a week for four successive weeks in the *Omaha Daily World-Herald*, and the *Omaha Daily Bee*, said newspapers being printed, regularly issued and published, and having a general circulation in said County of Douglas, State of Nebraska, and also in some newspaper printed, published and regularly issued, and having a general circulation in the City of New York. All provisions of the original decree to which this paragraph is amendatory, which are in conflict with any of the provisions of this paragraph are hereby cancelled and annulled, but in all other respects said decree as entered by said Circuit Court of the United States for the District of Nebraska on June 24, 1895, shall be and remain firm and effectual."

Touching the appeal taken by Thaddeus S. Clarkson, as ancillary receiver of the Illinois Company, it is only necessary to say that his application to file an answer to the bill of complaint was made too

late, and was properly denied by the Circuit Court for that reason, as well as for the reason that an answer setting up all the defenses which he proposed to make had already been filed by the company which he represented. The Circuit Court was justified in denying an application to file an answer which was not made until all the testimony had been taken and the cause had been heard and submitted.

The decree of the Circuit Court for the District of Nebraska as herein modified by the aforesaid provision ordered to be inserted therein, is hereby affirmed, each party to pay its own costs in this Court, except the costs incurred on the appeal taken by Thaddeus S. Clarkson, Receiver, all of which costs will be taxed against said last-named appellant.

Filed March 16, 1896.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

994 & 995

Office Supreme Court
FILED
MAY 4 19
JAMES

In the Supreme Court of the United States.

THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS; THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND ALONZO B. HUNT, TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY,

Petitioners for Certiorari.

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendants.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,

Petitioner for Certiorari,

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendant.

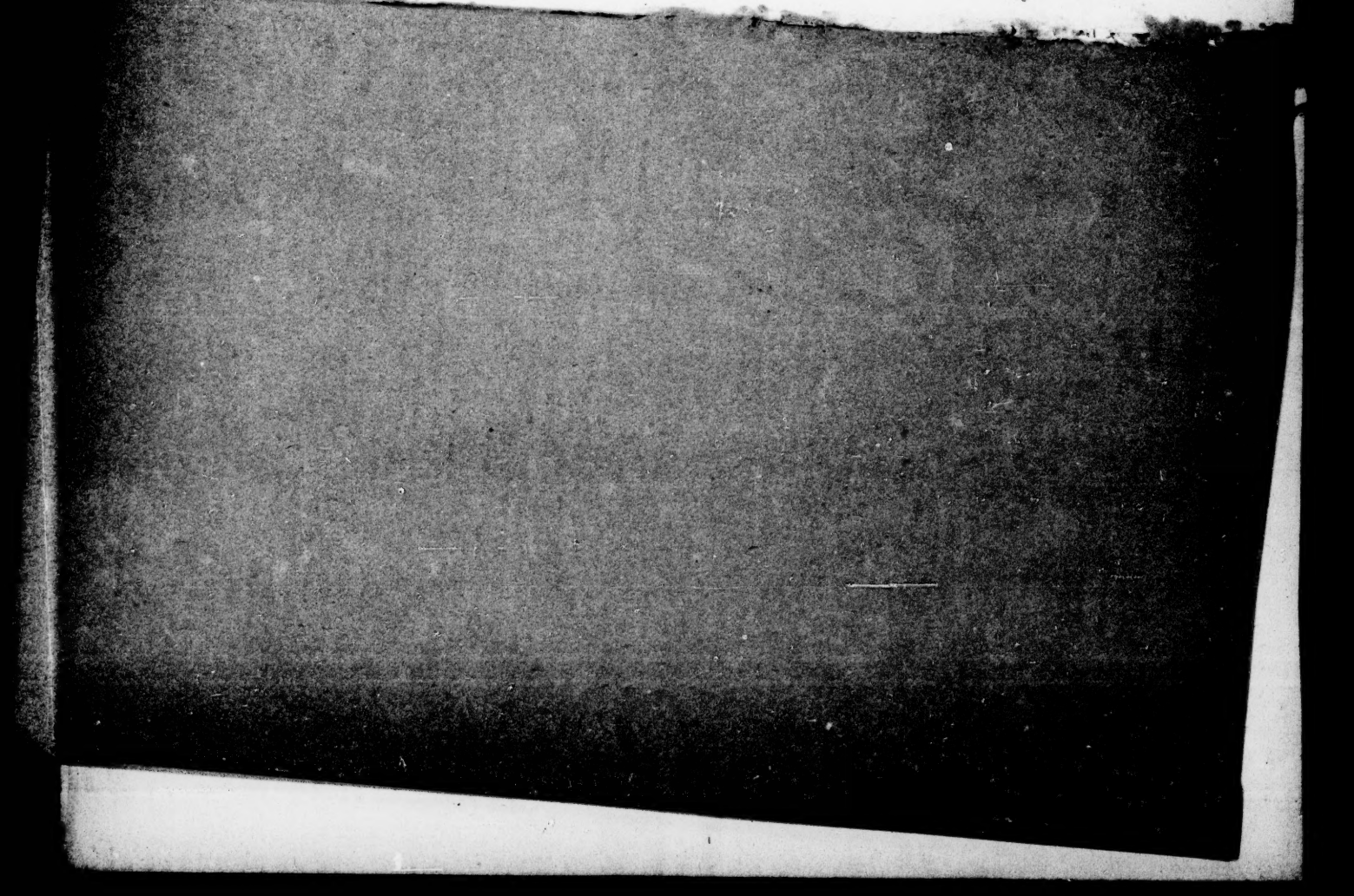
Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

JNO. L. WEBSTER,

Attorney for Petitioner.

Raber, Printer, N. Y. Life Building, Omaha.



In the Supreme Court of the United States.

THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS; THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND ALONZO B. HUNT, TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY,

Petitioners for Certiorari.

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendants.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,

Petitioner for Certiorari,

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendant.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

BRIEF AND ARGUMENT.

For the American Water Works Company (of Illinois) and American Water Works Company of (New Jersey) and A. B. Hunt, Receiver of the American Water Works Company of (New Jersey) and Thaddeus S. Clarkson, Receiver of the American Water Works (Company of Illinois).

STATEMENT OF THE CASE.

On the 9th day of October, 1893, The Farmers Loan & Trust Company filed its bill to foreclose two certain mortgages on the water works plant situated at Omaha, Nebraska, executed by the American Water Works Company (of Illinois).

The first mortgage bears date July 1, 1887, but acknowledged July 11, 1887, and was made to secure $400,000,000, twenty (20) year six per cent bonds. The second mortgage is denominated a supplemental mortgage and bears date January 16, 1889, and is intended to further secure the said issue of bonds.

Answers were filed by the American Water Works Company of Illinois, and the American Water Works Company (of New Jersey) pp. 69 to 82, and also by Alonzo B. Hunt, temporary receiver of the American Water Works Company (of New Jersey.) pp. 109, 124.

These answers are substantially the same, and pleaded as defenses:

1. That the said system of Water Works were constructed under a franchise granted by the city of Omaha for supplying the city of Omaha with water for public and private use. (pp. 70 to 76.)

2. That the mortgagor company had no authority or power to make said mortgages or to issue said bonds. (p. 76.)

3. The trust company and the bondholders must be held to have had notice of the want of authority to make the mortgage or to issue the bonds. (p. 76.)

4. That the franchise granted to the mortgagor company was for the ultimate use of the city of Omaha and that the company was without authority to do any act that would conditionally or otherwise disable it from the continued operation of the Water Works plant. (p. 76, 77.)

5. That all the property covered by said mortgages is necessary for the use of the company in supplying the city with water. (p. 77.)

6. That it was well known by all the parties in interest that the foreclosure of such mortgages would deprive the water company of the property and means necessary to carry out its obligations to the public and that by reason of the premises the mortgage was void. (p. 77.)

7. That under the franchise granted by the city of Omaha, the municipality had such an interest in having the Water Works Company continue its duty to the public as could not be taken away by foreclosure sale. (p. 78.)

8. That the mortgagor company never granted authority to its president and secretary to make and execute the mortgages in suit.

9. That no such default in payment of coupons occurred as is set out in bill of complaint and that the company is not insolvent and was only prevented from making payment by reason of the fact that the property was taken possession of by the court and its income placed and kept in the hands of receivers. (p. 79.)

10. The answer of A. B. Hunt, receiver of the New Jersey company is more specific to the point that the mort-

gagor company was without authority to execute the bonds and mortgage in this, to-wit:

a. That under the laws of the state of Nebraska, where the property is situate, a corporation could not become indebted in an amount beyond two thirds of its capital stock.

b. That this property formerly belonged to the City Water Works Company of Omaha, Nebraska, a corporation with a capital stock of $600,000, and which had issued its bonds and mortgage to the amount of $400,000, still outstanding, which are referred to in the bonds and mortgage in suit.

c. That the Illinois company, the maker of the mortgages in suit, is only capitalized at $600,000, and had issued its consolidated mortgage to secure an issue of bonds in the amount of $4,000,000.

d. That neither the state of Nebraska, nor the city of Omaha, consented or acquiesced in the making of this mortgage upon the franchise and plant of the City Water Works Company. (pp. 118, 119).

11. That the formation of the said Illinois company was a scheme and device by which the said Water Works Company of Omaha was organized under the laws of the state of Illinois, for the purpose of executing and issuing the bonds and mortgage in suit, in violation of and in evasion of the laws of the state of Nebraska, all which matters were known to the trustee and the bondholders. (pp. 119, 120.)

12. That none of the bonds have been issued or sold for value. (p. 118.)

13. That amendments were filed to the original answers of the water works company, the same specifically setting out the want of authority of the mortgagor company to make and execute the mortgages, that the same were, *ultra vires* and void, in that they were made without statutory authority;

were in excess of the powers of the company to make the same; were in violation of the laws and policy of the state of Nebraska; and that said bonds were not sold and delivered to *bona fide* holders for value. (pp. 205-207.)

That in a suit lately pending in the Circuit Court of the United States for the district of Nebraska, wherein the United Water Works Company (limited) was plaintiff, and the American Water Works Company (of Illinois) and the American Water Works Company (of New Jersey) et al. were defendants, a decree was entered by said court, in which it was adjudged and decreed, among other things, that the legal title to all the property in controversy was in the American Water Works Company (of Illinois), the mortgagor company, and which decree annulled, set aside, and held as void, the pretended transfers of said property to said New Jersey company, and which divested the said New Jersey company of any right, title or interest in or to said properties.

That afterwards, on or about the 1st day of May, 1895, in a suit brought in Cook county, in the state of Illinois, wherein the Holly Manufacturing Company was plaintiff and the American Water Works Company (of Illinois) was defendant, an interlocutory decree was entered appointing a receiver of all the properties and assets of said Illinois company, with a view of winding up the affairs of said corporation.

That afterwards, on or about the 2d day of May, 1895, the said Holly Manufacturing Company filed its ancillary bill in the Circuit Court of the United States for the district of Nebraska, praying for the appointment of an ancillary receiver, whoreupon the said last named Court appointed Thaddeus S. Clarkson as such receiver of all the properties and assets of the said Illinois company being situate within the state of Nebraska, by which appointment said Thaddeus S.

Clarkson was directed to make defense to said foreclosure proceedings and to protect the said property for the benefit of the general creditors and stockholders of said company, which said appointment of said Thaddeus S. Clarkson as such receiver was made on or about the date when these said foreclosure proceedings came on for a final hearing.

That afterward, on the 24th day of June, 1895, and before the entering of the decree herein, the said Thaddeus S. Clankson moved the court for leave to file his answer in the said foreclosure suit (p. 251) and accompanied said motion by his answer, which set forth all said foregoing proceedings, and which answer also pleaded the various defenses to the foreclosure suit theretofore pleaded by the other defendants herein before set forth. (pp. 251, 271).

That the court denied the motion of said Clarkson for leave to file his said answer and make defense. (p. 271.)

The status of the water plant intended to be covered by these two mortgages is as follows:

In 1880, the city of Omaha undertook to devise a plan to have constructed by contract a system of water works for the use of the city and its inhabitants. To that end it first employed J. D. Cook, an engineer of repute, to draft and submit to the mayor and council a plan or system of water works. Mr. Cook made a report which was approved by the city council June 8th, 1880. (pp. 130, 146.)

That report set forth a system by which water should be taken from the Missouri river and supplied to the city for private, domestic and public uses, and more particularly for fire protection. It defined the size, length and capacity of water mains. It named the streets in which mains should be laid. It named the street intersections at which fire hydrants should be located, also fixed the size of such hydrants, and the amount of water pressure that should flow therefrom. It

provided for a system of settling basins to purify the river water, the capacity of such basins and how to be constructed.

It provided for a system of reservoirs, three in number, with a capacity of not less than three million gallons each.

It provided for pumping machinery, two engines, of a pumping capacity of five million gallons in twenty-fours hours.

There was an appendix to the report, being the result of a conference between Mr. Cook and a committee of the city council, which appendix set forth an increased pipe distribution and location of fire hydrants. (pp. 147, 148.)

ORDINANCE No. 423.

On the 11th day of June, 1880, (three days after the approval of Cook's report) the mayor and council passed Ordinance No. 423, entitled: "An ordinance to authorize and procure the construction and maintenance of water works in Omaha, state of Nebraska." (p. 149.)

A summary of the ordinance is as follows :

SEC. 1. Provided that any person, company, corporation or association who shall erect, construct, or maintain water works of the capacity, magnitude and character hereinafter described as more fully appears in the report of J. D. Cook, approved by the city council June 8th, 1880, for the purpose of supplying the city of Omaha and the inhabitants thereof with water for domestic, mechanical, public and fire purposes, shall have the use of the streets for the purpose of placing the water pipes and fire hydrants during the time any such person, company or corporation or association, or their assigns shall maintain and operate such water works, and while constructing the same upon the terms and conditions hereinafter mentioned.

Would not this franchise terminate on foreclosure sale?

"Assigns" would not include mortgage or purchaser at such sale. 130 U. S., 30-31.

SEC. 2. .Provides for the supply of water to be taken from the Missouri river, and to be purified by proper settling reservoirs. (p. 150.)

SEC. 3. Provides that the pumping machinery shall have a capacity of 5,000,000 gallons of water each day, to be in-

creased as the growth of the city or its needs require; and provides the minimum of the water pressure for fire purposes at different points of location in the city. (p. 150.)

SEC. 4. Provides that the water mains shall be of the size and lengths set forth in the report of J. D. Cook, "said mains to be cast and tested at the expense of the party building the said works under the supervision of an experienced foundry inspector to be appointed by the city of Omaha," and to stand a pressure of 300 pounds to the square inch, to be cast vertically in dry sand. (p. 150.)

SEC. 5. Provides for the laying of the water mains and the placing of hydrants in the public streets, and to save the city harmless from damage resulting from the laying of such water mains or the displacement of material. (p. 151.)

SEC. 6. Provides for the placing of 250 fire hydrants, and the pattern, style and kind thereof, the same to be located at points designated in the report of J. D. Cook, "and shall have the capacity and power to afford ample protection to property against fire and have a radius of 1,000 feet from each and every one of said hydrants without the aid of either steam or hand engines," and provides for the relocation of hydrants by the order of the city council. (p. 151).

SEC. 7. Provides for fire-proof buildings, pumping stations, etc. (p. 151.)

SEC. 8. Provides that the company shall furnish water to the city free of charge for certain purposes, to-wit: for Hanscom Park; for the public schools of the city; for public drinking fountains; for flushing sewers and other sanitary purposes under the control of the board of health of said city of Omaha. (p. 152).

SEC. 9. Provides for the establishment of the grades of the streets and for the laying of water mains. (p. 152).

Could purchaser at judicial sale be compelled to do this?

SEC. 10. Makes it the compulsory duty of the company to supply water to the citizens residing along the water mains, and sets forth a maximum tariff rate for water supplied to consumers for all purposes. (p. 152).

SEC. 11. "In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall

construct water works under this ordinance to comply with the provisions and repuirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said city of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in Section 14 of this ordinance. *Provided*, that nothing shall be paid or allowed for the unexpired franchise of such person, company, or corporation." (p. 154).

Forfeiture would result by a foreclosure sale.

Court cannot make a new contract.

SEC. 12. Provides for the receiving of proposals for the construction of said water works. (p. 155.)

SEC. 13. Provides when the water plant shall be completed. (p. 155.)

SEC. 14. "The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third: *Provided*, that nothing shall be paid for the unexpired franchise of said company." (p. 156.)

That afterward on the 14 day of July, 1880, the city council of the city of Omaha passed Oordinance No. 430, which was approved by the mayor July 15, 1880, making certain amendments to said Ordinance No. 423, hereinbefore mentioned. (p. 156.)

In section 12 of said Ordinance No. 430 it is provided that the city clerk of the city of Omaha should advertise for sealed proposals for furnishing the city of Omaha with water for fire protection and for public use for the term of twenty-five (25) years, according to the provisions of said ordinance, and further provides that the bids received shall specify the

How mortgage or sell this contract? No such authority granted.

price per hydrant per year to be paid therefor by the city of Omaha as in said ordinances and in said report of J. D. Cook provided, and that said bids should also be accompanied by an acceptance of the provisions of said ordinances in the event the contract for the supply of water for the public and fire protection should be awarded. (pp. 157, 158.)

5. In compliance with said advertisement for sealed proposals one Sidney E. Locks made a bid for the construction of a system of water works, in compliance with said ordinances and said report of said J. D. Cook. (pp. 111, 112.)

Said proposal was accepted by the city of Omaha, and afterwards, on the 20th day of July, 1880, a written contract was entered into between the said Sidney E. Locke and the city of Omaha for the construction of a system of water works, which said contract made reference to the said report of the said J. D. Cook, and to said Ordinances Nos. 423 and 430, and to the advertisements for sealed bids which was made by the City Clerk pursuant to said ordinances. (pp. 159, 161).

That afterwards, on the 26th day of July, 1880, the said Sidney E. Locke, for a good and valuable consideration, did assign, sell, transfer and set over unto "the City Water Works Company of Omaha, a corporation organized under and existing under and by virtue of the laws of the state of Nebraska, said contract for the construction, operation, control and maintenance of water works in the city of Omaha, with all the rights, privileges, immunities, profits, duties and obligations that he, the said Sidney E. Locke, did have thereunder, to the same extent in each and every part as if said contract had been made with the City Water Works Company of Omaha originally, and not with said said Sidney E. Locke."

The articles of incorporation of the City Water Works Company of Omaha show that its capital stock was $600,000. (p. 216.)

This company built the plant and the work was accepted by the city by Ordinance No. 618. (p. 164.)

This company mortgaged the plant for $400,000 and which bonds are still outstanding. (p. 46.)

On the 29th day of June, 1887, there was organized the American Water Works Company, of Illinois. (pp. 125, 126.) The important features of its articles of incorporation are as follows. (p. 126.)

1. The name of such corporation is "The American Water Works Company."

2. The object for which it is formed is to build, equip, and operate works to supply water to cities, towns, villages and municipal and other corporations; to acquire by purchase, lease or otherwise such works and operate them, and to deal in the stocks and bonds of other corporations and associations organized for a similar purpose, the business to be carried on in this state and elsewhere.

A roving commission or tramp corporation.

3. The capital stock shall be six hundred thousand dollars ($600,000).

4. The amount of each share is one hundred dollars ($100.)

5. The number of shares is six thousand (6000).

This Illinois corporation never owned any property in the state of Illinois and never carried on any business in that state. (p. 215.)

It was promoted by C. H. Venner, S. L. Wiley and W. A. Underwood who at the time owned all the stock in the City Water Works Company. (The Nebraska corporation p. 212.)

The purpose of this new corporation was to evade the limitations in the laws of Nebraska. (p. 212.)

This manner of incorporation as well as its purposes were invalid under the laws of Illinois. 130 Ill., 268.

To cover up this deception, names of persons were used as incorporators who never had any interest in it, but who

acted as dummies. (p. 214, folio 280.) See also letter of Underwood. (p. 213.)

The stock of the Nebraska corporation was transferred to the Illinois corporation.

There is nothing in the record showing a transfer of the legal title to the property in controversy from the City Water Works Company to the American Water Works Company (of Illinois) save inferentially from paragraph 6 of answer. (p. 75.) And if there was such conveyance, the Illinois company must be held to have assumed all the obligations of the original company to the city of Omaha.

Afterward the American Water Works Company (of Illinois) purported to make and execute the mortgage and a supplemental mortgage, sought to be foreclosed in this case to secure an issue of $4,000,000 bonds.

There was no ordinance passed by the mayor and city council of the city of Omaha authorizing the City Water Works Company, of the city of Omaha, to sell and convey the said water plant to the American Water Works company (of Illinois), or to make and execute the mortgages in controversy upon the water works plant; nor was there any law of the state of Nebraska authorizing such transfer of the property by the said water works company of Omaha to the American Water Works Company of (Illinois), or authorizing such mortgage.

There is no proof in the record of a sale of any of these bonds except paragraph 4 of stipulation (p. 210) but bonds to the amount of $3,600,000 were delivered to the following persons in following amounts:

W. T. Hatch & Sons	$ 50,000
Wilson, Colson & Co	50,000
W. & P. Smith	285,000
Woodbury & Moulton	65,000
C. H. Venner & Co	3,150,000

See table, p. 167.

For the discussion to the point that all of the above bonds except $165 000 went to officers and stockholders of the mortgagor company. See p. 56 of this brief.

On the 24th day of June, 1895, the Circuit Court entered its decree of foreclosure in which it found the amount due on the bonds and coupons to be $4,159,054.18. (p. 273.)

For Copy of the Statutes of Nebraska authorizing certain corporations to make mortgages. See p. 19 and 20 of this brief.

BRIEF OF ARGUMENT.

Plea to the Jurisdiction.

On this point the facts are sufficiently stated in the plea to the jurisdiction. See p. 66, record.

This case is distinguishable from the case where a bondholder or trustee intervenes in a pending litigation to protect his interests.

This is not a bill ancillary to the procedure theretofore pending in the Federal Court. This suit was begun and con-

ducted absolutely as an original proceeding. By the order of the Court appointing receivers in this case the Court treated this action as an original proceeding, and so it has been conducted all the way through. P. 56, record.

Some Suggestions Touching Opinion of the Court of Appeals.

The conclusion of the Court seems to have been arrived at by assuming

1. That the bonds had been sold for value and were in the hands of innocent and *bona fide* holders.

2. That the title to the property was in the New Jersey corporation, and which corporation by reason of the covenants in the deed to it could not be heard to question the validity of the mortgage.

3. That the rights of the city of Omaha could not be considered because it is not a party to the suit.

The answer to these three suggestions lies in this:

1. The court in its opinion seems to have assumed that the bonds were in the hands of *bona fide* holders for value and that the proceeds of the bonds had gone into the water plant. Neither of these propositions is true in fact. See p. 54, 55 and 56 of this brief. There is no proof in the record anywhere to the point that there were any *bona fide* holders of any of these bonds for value, and there is no proof in the record anywhere that any portion of the proceeds of these bonds went into the water plant.

2. The fact is that the Circuit Court of the United States for the district of Nebraska had entered its decree re-investing the title to this property in the Illinois corporation and vacating

and holding as null and void the conveyance to the New Jersey company.

It was on the strength of this fact that the Circuit Court in Cook County, Illinois, appointed the receiver for the Illinois company, and it was on the strength of this fact that the United States Circuit Court for the district of Nebraska appointed Thaddeus S. Clarkson as such receiver. These facts are admitted in the statement of facts found in the opinion of the United States Circuit Court of Appeals. It is no answer to say that these matters were pleaded only in the answer which Clarkson asked leave to file.

The fact still remains, that the facts above stated were substantial existing facts, of which the Circuit Court was bound to take judicial notice, independent of Clarkson's answer. In other words, to strike out of the case an admitted and conceded fact, and thereby create an artificial case, in order to base a legal argument, to the point that the New Jersey company being the owner of the property and having purchased it subject to the mortgage, could not therefore be heard to contest the mortgage, does not seem to me to be deciding the real case before the court. In view of the real facts that part of the opinion should have been omitted.

3. It does not seem to us that there is anything in the point made in the opinion that the defendant companies could not be heard to plead that the mortgage was *ultra vires*. If the mortgage was void, or even unlawful; in other words if it was against policy to make a mortgage upon a water plant without statutory authority, then the trustee was forbidden to foreclose the mortgage. The trustees and bondholders were just as much a part as to that transaction as the mortgagor company, and by virtue of the recitals in the bonds and mortgage they were all *particeps criminis*, so to speak, in the same transaction. The real question before the Court was, could the trustee be heard in a Court of Equity to enforce an illegal

or unlawful contract, to-wit: a contract against public policy, to which such trustee was a knowing and willing party.

4. True, the city of Omaha was not a party to the foreclosure suit, but that was no fault of the city, it was the fault of the complainant, the trustee, which failed to make the city a defendant.

5. The real point in the case is that the mortgage was void as being made without statutory authority and against public policy, and to undertake to sustain the mortgage and to grant a decree of forclosure, upon the pretext that the mortgagor companies could not be heard to make this defense, is to escape or evade the real question at issue. Such evasion works out the harmful result, to-wit, the sale of that property under the decree of foreclosure which under the law was not subject to such sale.

6. The opinion of the Court apparently assumes that the city of Omaha as a muncipality recognizes the right of the Illinois company to mortgage the property. This is a misapprehension. The city of Omaha never in any manner or form gave its consent to the creation of any encumbrance whatsoever upon the Water Works plant.

It is true the city of Omaha consented to the assignment of the Water Works franchise to the Illinois company. See record p. 246, Exhibit M. The city of Omaha also paid hydrant rental to the Illinois company, but that was nothing more than the recognition of the Illinois company as the legitimate asignee of the franchise granted by the municipality. It cannot be said that because the municipality paid hydrant rental to the Illinois company that such fact amounted to a recognition of the right of the Illinois company to mortgage the Water Works plant.

THE MORTGAGE IS VOID.

Water Works Companies cannot mortgage their

plant when the same is part of the municipal machinery for the performance of a public duty, unless authorized to do so by statute law or their charter.

We will consider the reasons for the above propositions under separate heads.

No precedent for sustaining such mortgage.

We are not aware of any adjudicated case in which the power of such a water company to mortgage its plant has been sustained without such authority. There are a few cases in the books where mortgages upon water plants have been foreclosed, but so far as we have examined them, the points we here make were not touched upon. In most, if not all of such cases, there existed statutory authority to make the mortgage.

Hackensack Water Company vs. Dekay, 36 N. J., Eq., 548, may serve as an illustration, and it is the only case cited in Cook on Stockholders.

It appears from the statement of the case that the Hackensack Water Company was incorporated by an act of the legislature, and *Sec. 13* of the act empowered the company to borrow *money and to secure ehe same by bond and mortgage* upon its *property and franchise.* The chief point made in the case was that the mortgage was for a larger sum than was authorized by the charter, to-wit: in excess of two-thirds of the actual capital stoch. The bonds, in fact, were within the possible limit of two-thirds of the capital stock, as the authorized capital stock had been raised to $100,000.00 and the bonds limited to $66,500.00.

Wood vs. Guraantee Trust Co., 128 U. S., 416, may be cited by appellees, but the only question before the court in that case related to the transfer of coupons—whether the same was a purchase or payment—and as to their priority over the bonds. The validity of the mortgage was not before the court

and not considered—or even spoken of. It may be suggested by appellees that in Michigan and other states water companies are treated as private corporations, with like powers to make mortgages; but not so.

Michigan grants to water supply companies by statute the power to mortgage their plants. See Sec. 3127. Also Street Railway Companies, Sec. 3551.

In *Massachusetts* it has been held street railway company could not make a mortgage without statutory authority. *Richardson vs. Sibley*, 11 Allen, 65. So later on Massachusetts by statute authorized mortgages by railway companies. See Act of 1874, C. 372, Sec. 49, and Act of 1875, C. 58, Sec. 1; by Street Railway Companies, Statutes 1889, C. 316.

Wisconsin. *Andrews vs. National Foundry & Pipe Works*, 61 Fed. Rep., 782, may be referred to, but the statutes of Wisconsin are broad enough to confer the authority. Sec. 1748 and Sub-Div. 7.

Other cases will be mentioned and considered later on.

Suffice it now to say that the fact that foreclosure of such mortgages may be found in the reports should not be taken as adjudications that such mortgages may be made without statutory authority, without first ascertaining whether the question in hand was before the court, and whether or not there was not some statute which conferred the authority. Without such authority we insist the power does not exist.

REASONS WHY THE MORTGAGE IS VOID.

First--There is no statute in Nebraska or Illinois authorizing such mortgage.

Nebraska Chap. 16, Compiled Statutes of 1891.

SEC. 212. "Every union depot company shall have power and is hereby authorized to mortgage or execute deeds

of trust for the whole or any part of its property or franchises," etc.

SEC. 117. "Every railroad company shall have power and is hereby authorized to mortgage or execute deeds of trust for the whole or any part of its property or franchises," etc.

SEC. 84. (Subdivision Railroad Companies.) "Such company shall have power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and to secure the payment thereof may pledge the property and income of such company," etc.

The above are all the sections of the statute laws of Nebraska which in terms grant to corporations the power to execute mortgages. These sections do not cover the case in hand. They stand as signboards of the policy of the state that wherein the lawmakers intended that such power to mortgage should exist it is so declared; hence, excluded in all other cases.

In *Commonwealth vs. Smith*, 10 Allen, 456, the court, in referring to the authority conferred by statute upon certain corporations to execute mortgages, and the absence of such authority in other cases, said:

"The cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a striking implication that it would not otherwise exist," etc.

The Illinois act relating to railroad corporations contains a provision authorizing such companies to mortgage their property.

We are not aware of any statute of Illinois conferring the power upon water works companies to mortgage their property.

Second--The water company was without authority to dispose of its property so as to disable it from performing its public duty to the city. Public policy forbids and condemns alienation or sale of such

property, whether under either execution or judicial process.

The relation of the water company to the city is disclosed in the proceedings of the mayor and council in the steps taken to have such water works constructed under contract, in the ordinances defining how and in what manner the water works plant should be constructed, the capacity of its pumping engines, and the reservoirs and settling basins, the supervision and control thereover reserved to the city, and so on.

In short, the case stands, as to power of alienation or sale, the same as if the works had been constructed and owned by the city.

The construction of the water plant by and through the agency of a contract was but a means to an end.

To encumber the property by a mortgage and to permit the same to be sold under foreclosure would deprive the water company of ability to perform its obligations to the city, and therefore the sale of the property under the mortgage would be an unwar-warranted proceeding.

This would be but a circuitous or round-about way of doing what could not be done directy. This property could not be seized or sold under execution. The water company could not enter into any contract which would be compulsory upon it to waive its right of exemption from such sale. How, then, can it do so under the form of a mortgage without the consent thereto of the interested public, to-wit: the city or the state. Neither the city nor the state ever gave such consent.

THE STATUS OF THE WATER PLANT.—The plant consists of engine houses, pumping engines, reservoirs, settling basins, and the real estate on which the same are located and necessary

for such use; also water mains extending through and in the streets of the city to supply the general public with water for domestic purposes, and fire hydrants for use by the city of Omaha for fire purposes, together with the franchise, assessments and privileges connected therewith.

The works were constructed under a contract with the city of Omaha made pursuant to ordinances Nos. 423 and 430.

The mayor and council of the city of Omaha have the power to construct or to provide by contract for the construction and maintenance of a system of water works for domestic and public use and for fire protection.

Sec. 61 Charter of Metropolitan Cities:

"The mayor and council shall have power to erect, construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of the water supplied by such water works, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use, in the construction and operation of such water works, compensation for such appropriation to be made as provided by this act. And the mayor and council of each city created or governed by this act shall have power to construct and maintain water works on such terms and under such regulations as may be agreed upon, or to provide by contract for the construction and maintenance or leasing of water works, or any main or line thereof or settling basins therefor."

Two noticeable features exist in this law:

1. The power of eminent domain.

2. The water plant, whether constructed by the city council or by contract remains equally under the absolute control of the city.

Independent of this section, the ordinances which are

made a part of the contract under which this plant was constructed reserve these rights to the city.

Coupled with the power of the city to *contract* for the construction of a water plant, is the right of the city to *choose whom it will contract with.* It is not a case where by judicial sale or otherwise the court can, without the consent of the city, substitute a new contracting party and compel the city to accept such new party, and to confer upon such new party all the rights and privileges granted to the party of the city's own choosing.

City has the right to choose whom it will contract with.

Neither the *present company*, nor any other water company, *could exercise the power of operating* a system of water works in Omaha *without submitting to such conditions* and *regulations* and *ordinances* of the city as it was the pleasure of the city to enact or had enacted, and could not *lay* and *maintain pipes* and *mains* in the *streets* without the *consent of the mayor and council* granted in due and regular form.

The defendant company is *impressed with a public character*, and is *quasi municipal*, and is bound to fulfill its *public duty* to the *city* and *to all its inhabitants* in full compliance with the *contract and ordinances relating thereto.* The duty which it owes *to the public* is as *comprehensive, certain* and *compulsory* as it would be if *the plant was owned by the city.* So far as the *public is* concerned, it is in the *same attitude* and *subject to the same obligations as if it were owned by the city.* In short, *is the city which is furnishing water to the public*, but the city resorted to the power given it to perform the duty to the public through the channel of a contract, *and is performing that duty through the defendant company* for economic and prudential reasons, instead of using its public funds to construct and maintain such water works.

The water company being engaged in a business of a *public character, is charged with the performance of a public*

duty. It must be held to have assumed an obligation to *fulfill the public purposes which it was created to subserve.* It can only exist by virtue of the services to be performed for the public. "THAT THEY SHOULD BE PERMITTED OR REQUIRED TO FORCED TO ABANDON THE PERFORMANCE OF SUCH PUBLIC DUTY IS AGAINST THE POLICY OF THE LAW." *People ex rel. Peabody vs. Chicago Gas Trust Co.*, 130 Ill., 268.

Sale under mortgage would violate this.

The *quasi municipal character* is further impressed upon the water plant by Sec. 14, Ordinance 423, by which the *city of Omaha has a contingent ownership of the water works.*

"SEC. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by city council, one by the water works company, and these two to select the third; *provided*, that nothing shall be paid for the unexpired franchise of said company." (p. 156.)

No person or corporation has the right to dig up the streets, and lay water mains, and erect fire hydrants, and carry on the business of furnishing water to the houses of the city of Omaha *without special authority from the city. New Orleans Gas. Co. vs. Louisiana Light Co.*, 115 U. S., 659; *Crescent City Gas Light Co. vs. New Orleans Gas Light Company*, 27 La., Ann., 138-147.

How could purchaser do this?

The business of supplying a city with water, like that of supplying gas, is "*a business of a public nature to meet a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and safety.*"

City not party to neither consented to the mortgage.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 669.

The supplying of water to a municipality is a business of a public nature to meet a public necessity. It is not a business

like that of ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *Whatever interferes with or restrains to any extent the operation of the works prejudices the public interest and is in contravention of public policy.*

Gibbs vs. Baltimore Gas Co., 130 U. S., 408.

The only means of supplying water to the citizens of Omaha is through the agency of defendant company. It is within the every-day knowledge of us and within the judicial knowledge of the court, that the supplying of water to the city and its inhabitants is *a public necessity.* The *business of the company does not fall within that class of corporations which manufacture articles for trade and commerce, which may be transported from market to market throughout the world.* It is in no sense a trading corporation, for its product depends exclusively upon home consumption.

The supply of water seriously affects the public and individual convenience of the immediate community.

The company is compellable by law to furnish the city and its citizens an adequate supply of water. It is compellable to continue the operation of its obligations to the public. *We must consider this question in the light of results and consequences*; THESE ARE EVERYTHING.

The public is directly interested in the results and operation of the water company, and in the facilities it shall have to perform its duty, free from attachment, executions and sales. As said by the Supreme Court of Pennsylvania in a case hereafter cited:

"IT IS WELL SETTLED THAT THIS USE IS NOT TO BE DISTURBED BY THE SEIZURE OF ANY PART OF THEIR PROPERTY ESSENTIAL TO THEIR ACTIVE OPERATION BY CREDITORS."

The direct benefit and accommodation to the public aris-

ing from the supply of water clearly distinguish this class of corporations from such corporations in which the public is only indirectly interested.

What was said in *Susquehanna Canal Co. vs. Bonham*, 9 W. & S., 17, applies with double force here:

"*The privileges granted to corporations to cinstruct turnpike roads, canals, etc., are conferred with a view to the public use and accommodation, and they cnnnot voluntarily deprive themselves of the land and real estate and franchise which are nicessary for that purpose;* NOR CAN THEY BE TAKEN FROM THEM BY EXECUTION AND SOLD BY A CREDITOR, BECAUSE TO PERMIT IT WOULD DEFEAT THE WHOLE OBJECT OF THE CHARTER BY TAKING THE IMPROVEMENT OUT OF THE HANDS OF THE CORPORATION AND DESTROYING THEIR USE AND BENEFIT."

Third--Public character of the corporation.

Some authorities may be cited by appellees to the point that the water company is a private corporation, hence has authority to mortgage its property, such as:

Detroit vs. Mutual Gas Light Co., 43 Mich., 594.

Hays vs. Galion Gas Light & Coal Co., 29 Ohio St., 330.

Evans vs. Boston Heating Co., 157 Mass., 37.

In Michigan the statute grants the right to water companies to mortgage their plants. In Ohio case it was ruled authority existed under the statute to make the mortgage. In the Massachusetts case the character of the corporation was private and not public.

Be that as it may, the law is well settled by weight of authority that a water company, circumstanced as this, is a public and not a private corporation.

This appears from what has gone before; but more on this point.

WATER COMPANIES ARE QUASI PUBLIC CORPORATIONS, AND HAVE NO RIGHT TO MORTGAGE THE PROPERTY NECESSARY FOR THEIR USE IN FULFILLING THEIR DUTY TO THE PUBLIC.

"A water works company is also a *quasi* public corporation." *Cook*, § 932.

In the case at bar there is a provision in the ordinance and contract by which the city may obtain a transfer of the plant to the municipality. In *Foster & Co. vs. Fowler et al*, 60 Pa. St, 27., it was said, speaking of the Monongahela water company:

"A PROVISION IS ALSO CONTAINED IN THE CHARTER FOR THE EVENTUAL TRANSFER OF THE WORKS TO THE MUNICIPAL CORPORATIONS ABOVE MENTIONED. IT IS THUS NOT ONLY A PUBLIC CORPORATION IN ITS POWER AND PURPOSES, BUT IS SUBJECT TO BECOME MUNICIPAL PROPERTY.

"It will hardly be disputed that the operation of this corporation were to *supply* not a convenience only, but a *matter of prime necessity directly to the public* and to be regarded as directly effecting the public. It is, in this aspect, as important to the public as are convenient roads and highways, which, when constructed by companies, are always regarded as the works of public corporations.

Monongahela Water Company cases.

"Regarding the corporation of the Monongahela Water Company, therefore, as a public corporation, it stands on principles announced in *Ammant vs. Turnpike Co.*, 13 S. & R., 210; *The Turnpike Co. vs. Wallace*, 8 Watts, 316; and the *Susquehanna Canal Co. vs. Bonham*, 9 W. & S., 27. In this last case SARGEANT J., said: 'The privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate and franchise which are necessary for that purpose; NOR CAN THRY BE TAKEN FROM THEM BY EXECUTION AND SOLD BY A CREDITOR, BECAUSE TO PERMIT IT WOULD DEFEAT

THE WHOLE OBJECT OF THE CHARTER, BY TAKING THE IMPROVEMENTS OUT OF THE HANDS OF THE CORPORATIONS AND DESTROYING THEIR USE AND BENEFIT!"

In *McNeal Pipe and Foundry Co. vs. Bullock et al.*, 38 Fed. Rep., 565, it was said:

Bienville Water Co. case.

"It appears from the declaration that the BIENVILLE WATER SUPPLY COMPANY is a *public corporation* or *quasi* public corporation of such a nature, and the property sought to be condemned to the alleged lien is of such a nature that it should not be subject to the lien claimed by the plaintiff in his complaint, *on the ground of public necessity and convenience.*"

Louisville Water Co. case.

See also *Louisville Water Co. vs. Hamilton*, 51 Ky., 517.

The same principles applies to water works companies as to gas companies. In *Chicago Gas Light Co. vs. People's Gas Light Co.*, 121 Ill., 539, it was said:

Chicago Gas Co. case.

"The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city *is a business of a public character;* it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant *are of a public nature.* Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is conferred as well for the *benefit of the public* as of the company.

In *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650, the Supreme Court of the United States says:

New Orleans Gas Co. case.

"The manufacture of gas and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, *is not an ordinary business* in which every one may engage, but is a franchise belonging to the government, to be granted for the accomplishment of *public objects* to whomsoever and upon what terms it pleases. It is a business of a *public nature* and meets a public necessity, for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

In *Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683, the same court say:

"Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensible to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the *public* may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the constitutian of Kentucky, authorized the legislature to grant to the defendant the exclusive privilege in question."

Louisville Gas Co. case.

Such being the public character of these companies, it is the *use of the public* that is primarily to be considered. Such property should not only remain intact, but it should remain in the company that obligated itself to perform this public duty. It is *no good or sufficient* answer to say the court can order the plant sold in *entirety*. The question beyond that is, whether the court can order or compel the purchaser to operate the works in compliance with the contract with the city. A still more difficult problem is, *can the court compel the city to accept the new party to the contract* and force the city to perform its part of the contract, with such purchaser at judicial sale. The city is no party to the mortgage or to the decree and is not judicially bound by it.

The city has a right to *choose for itself* whom it will contract with. It has a right to insist that the water works company shall continue to operate the works and supply water. Can the court *take away* that right by a judicial sale of the lands, engines and water mains? Has the court the power to make a new contract with the city for its supply of water by substituting a new party without the consent of the city?

That public policy which forbids a water company from disposing of its property necessary for its use in the performing of its duty to the public forbids the forcible taking of such property from the company or the creation of a lien thereon which might result in the seizure and sale of the property.

Gue vs. Tidewater Canal Co., 24 How., 257.
East Alabama Ry. Co. vs. Doe, 114 U. S., 353.
Susquehanna Canal Co. vs. Benham, 9 W. and S., 17.
Foster & Co. vs. Fowler & Co., 60 Pa. St., 27.
McNeal Pipe & Foundry Co. vs. Bullock et al, 38 Fed. Rep., 565.

These cases were all decided on the proposition that the corporations from their nature were *quasi* public corporations and distinguishable from private corporations.

Fourth--The right to mortgage the water works plant not being granted by statute must be held not to exist.

The duty of the company to the public is inconsistent with the right to mortgage and sale under foreclosure.

RIGHT TO MORTGAGE—HOW RESTRICTED—"This may be done by express provision in the charter, by general statute, or *by placing the corporation under such a duty to the public* that a foreclosure of mortgage would prevent it fulfilling its duty. *A. and E. Ency. of Law*, Vol. 4, p. 237.

In note 2 to the above quotation it is said: (p. 237).

Same mortgage and execution.

"Nor can property necessary to enable a corporation to perform its duties to the public be taken on execution. *Gue vs. Tidewater Canal Co.*, 24 How. (U. S.), 257; *City of Palestine vs. Barnes*, 50 Texas, 538. *The same principles apply, of course, to mortgages. Hall vs. Sullivan* (U. S. Dist., N. H.),

2 Redf. R. Cass., 621; 21 Law Rep., 138; *Comm. vs. Smith*, 10 Allen (Mass.), 448; *Richardson vs. Sibley*, 11 Allen (Mass.), 65.

It is not a question of what authority may be conferred upon the American Water Works Company under the terms of its charter, or conferred under the laws of Illinois upon such paper corporation. The question is one of the right to mortgage this PARTICULAR PROPERTY. In other words, the question is, pure and simple, can a water company sell, alien, or indirectly sell and dispose of by mortgage the property necessary to enable it to fulfill its duty to the public.

It must be conceded no statute conferred the right to either sell or mortgage this property. Without such statute no such power exists.

"And so when the use of property obtained by a corporation through the assistance of the state is necessary in order to enable the company to perform obligations assumed by it for the benefit of the public, *no authority to mortgage such property* can be implied; for if the power of mortgaging were conceded under those circumstances, the corporation might indirectly deprive itself of the means of performing its duties to the public. *Morawetz*, Sec. 346."

No implied power to mortgage.

WITHOUT POWER TO ALIENATE THERE CAN BE NO POWER TO MORTGAGE.—*Commonwealth vs. Smith et al*, 10 Allen, 448, is a case where was considered the power of the Troy & Greenfield Railway Company to make a mortgage to Smith and others as trustees, which mortgage by its terms covered the property of the corporation, to secure bonds to the amount of $900,000.00, to be issued to the contractor to pay for the construction work. HOAR J., in the course of the opinion said:

"*The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure.* The right of a railroad company to continue in being depends upon the performance

Mortgage equivalent to a sale.

of its public duties. Having once established its road, if that and its *franchise of managing using and taking tolls or fares* upon the same are alienated, *its whole power to perform* its most important functions is at an *end*. A manufacturing company may sell its mill and buy another; but a railroad company cannot make a new railroad at its pleasure."

If a railway company cannot make a mortgage on its property necessary for its use in fulfilling its duty to the public without statutory authority, how can a water works company do it? The same principle of public policy applies equally in both cases. It is a public policy that forbids it. The water works company is as much a public corporation as is the other. Its duty to the public presents a more supreme exigency.

So, too, the decree in the case at bar orders a sale of the contract between the company and the city, which carries with it the right to collect water rents (same as tolls and fares), which operates as a destruction of the corporation.

MORTGAGE VOID FOR WANT OF STATUTORY AUTHORITY FOR ITS EXECUTION.—The same principle was applied to a street railway company in Massachusetts and its mortgage held *to be void*. *Richardson et al. vs. Sibley*, 11 Allen, 65, is an instructive case much in point. The facts briefly stated are these:

The Worcester Horse Railroad Company was a corporation. It executed a *mortgage* upon all its property, including the railroad stock and railroad track and the franchise of the corporation to secure certain bonds.

The Central National Bank of Worcester became a creditor of the Horse Railroad Company and accepted certain of the bonds as collateral security for the debt. The bank began an action upon this claim, and caused a judgment to be issued and levied upon certain property of the Horse Railroad Company included in the mortgage.

Richardson et al, as trustees under the mortgage, replev-

ined the property. So far as appears from the case, it was conceded that the bonds had been sold and were in the possession of *bona fide* holders for value. The question was thus squarely presented whether the mortgage given to secure the bonds was void for want of statutory authority for its execution.

GRAY, J., said:

"A corporation has no power to do any acts which the legislature has expressly or by necessary implication prohibited it from doing. A corporation created for the very purpose of constructing, owning and managing a railroad for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute *or conditional*, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business, without its franchise to be a corporation can have little more than a nominal existence. *Shrewsburry & Birmingham Railway vs. London & Northwestern Railway*, 6 H. L. Cas., 136-137; *York & Maryland Line Railroad vs. Wians*, 17 How., 39; *Pierce vs. Emery*, 32 N. H., 504, 508; *Hall vs. Sullivan Railroad*, 21 Law Reporter, 140, 141; *Worcester vs. Western Railroad*, 4 Met., 565; *Commonwealth vs. Smith*, 10 Allen, 455, 456. Such was the opinion deliberately formed and expressed by the court in the case last cited after able arguments in which the authorities were fully referred to, and a mortgage by a railroad corporation of its franchise, railroad and all other property, made without authority of the legislature, was accordingly declared to be void as against a subsequent valid mortgage to the commonwealth. * * *

Mortgage void even though bonds in hands of *bona fide* holders for value.

"But any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on its business, which it had been chartered to do for the benefit of the public, is clearly within the terms and the meaning of this prohibition. It makes no difference whether the tranfser is absolute *or conditional*, to take effect immediately upon its delivery or at some future time. *A mortgage transferring a title which, upon the happening of a certain contingency may be made absolute by sale or foreclosure, has the*

Not voidable but void.

Same rule which forbids sale forbids a mortgage.

effect, as soon as it becomes of any value to secure the purpose for which it was made, to accomplish as complete a transfer of the corporate franchise and property and the means of performing the corporate duty as if it had been originally an outright sale." * * *

IF NOT SUBJECT TO EXECUTION, NOT SUBJECT TO MORTGAGE.—"It was argued by one of the learned counsel for the plaintiffs that the franchise to take toll might be taken on execution, and therefore might be mortgaged. It would be more accurate to say that such a franchise could not be sold, *or mortgaged*, and therefore could not be taken on execution without authority of the legislature." * * *

City Contract not subject to be mortgaged.

"The plaintiffs therefore acquired no title by the conveyance to them; and the creditors of the corporation could not, by taking bonds purported to be secured by a conveyance which was void on its face, be estopped to deny its validity or to pursue the ordinary legal remedies for the collection of their debts." * * *

Void and inoperative.

"This conveyance, whether regarded as a *mortgage* or as a deed of sale in trust, being wholly *void* and inoperative, because made in violation of the public policy of the commonwealth as manifested in these statutes, it is unnecessary to consider particularly the nature of the instrument, or the other grounds upon whtch the defendant has denied its validity."

In *Coe vs. Railroad Company*, 10 Ohio St., 372, the court said:

Use cannot be separated from the corporation.

"When power is given to acquire an interest in real estate for the single and exclusive purpose of the exercise of a franchise, and particularly when to acquire such interest there is a delegation of the power of eminent domain, the *interest cannot be separated from the use* to which alone it can be applied, and *if the franchise* cannot be conveyed neither can the *interest in real estate with which it is connected.*"

In *Railroad Company vs. Caldwell*, 39 Pa. St., 337, WOODWARD, J., said:

"As to land which has been appropriated to corporate objects and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by the exercise of the delegated power of eminent domain,

the company hold it entirely exempt from levy and sale, and this on no ground of prerogative or corporate immunity, for the *company can no more alien or transfer such land by their own act than can a creditor by legal process*, but the *exemption rests on the public interests involved in the corporation.*"

Exemption rests on public interests.

Louisville Water Company vs. Hamilton, 51 Ky., 517, was an appeal from a judgment of the Louisville Chancery Court enjoining the collection of taxes by the sheriff and to prevent the levy by him of an execution upon the appellant's property.

On the question whether the property of the water company could be disposed of so as to deprive the public of the benefits to be derived from it, *unless by legislative authority*, the court said:

"The trouble arising from the judgment below consists in the dissolution of the injunction by which the sheriff may and will seize the property of the company, and so dispose of it as to destroy the public use, or the benefits the public derive from it. This corporation, like a turnpike or railroad, cannot be seized or sold by a collecting officer, or the property necessary for its use, so as to deprive the public of the benefits to be derived from it, *unless by legislative authority*. This company furnishes water to nearly 200,000 inhabitants. Their daily wants require its existence and that the franchise shall be operated. It is essential to the health and comfort of the citizens and the safety of the entire city, and therefore the chancellor, having been appealed to by the appellant for some sort of relief, should have taken cognizance of the case, and required the appellant by rule to pay the money into court, and if not, to place the management of the corporation in the hands of a receiver, in order that the burden might be discharged."

Likened to a railroad company.

The logical conclusion to be drawn from all these cases is that they establish, or rather are founded on the principle that such corporations owe so important a duty to the public that the property necessary for their use in serving the public cannot be alienated by them, and hence cannot be mortgaged, for the right to mortgage means in the end sale under foreclosure.

WATER WORKS COMPANY LIKENED TO RAILROAD CORPORATION.—Water works companies belong to the same class of corporations as do railroad companies, in the sense that they owe a duty to the public which forbids them from alienating or mortgaging their property without legislative authority.

Bath Gaslight Company vs. Claffy, 26 N. Y. Supplement, 287, is a case in which it was ruled a gas company is a *quasi* public corporation and a lease by it of all its property and franchises is *ultra vires*, because it is an abandonment of its duty to the public.

In the opinion the court likened the case to that of railroad corporations, and said:

"This case cannot be distinguished, either in the character of the contract sued upon or in the cause of action set forth in the complaint, from the cases of *St. Louis V. & T. H. R. Co. vs. Terre Haute & I. R. Co.*, 145 U. S., 393. *Central Transportation Co. vs. Pullman Palace Car Co.*, 139 U. S., 24; *Penn. R. Co. vs. St. Louis Co.*, 118 U. S., 317; *Thomas vs. Railroad Co.*, 101 U. S., 71, and many other cases decided in the United State Supreme court. The decisions in these cases rested largely upon the fact that the contracting corporations were of *a quasi public character*, and exercised a public employment, and were charged with a duty of accommodating the public in the line of their employment; and in this respect, in their ability to contract for the disposal of their property they were distinguished from a private business corporation. It would be *impossible*, I think, to *make any distinction* in this respect between a *transportation* company and a *gas* company. Each in respect to its business, is charged with the duty of accommodating the public, and is subject to legislative control."

Like railroad cases cited.

Distinguished from private corporations.

"And it is the case generally that corporations to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantage, are impliedly restrained in their power of *alienation*. Railroad companies are of this class. They *cannot mortgage* their franchises or property essential to continued operation of the roads without legislative authority. *Jones on Mortgages*, § 124.

RAILROAD COMPANIES cannot mortgage their property without statutory authority. "Unless the charter or the statutes of the state expressly give this power, *such a mortgage is void.*" *Cook*, § 780.

Mortgage is void.

In *Platt vs. Union Pacific Railway Company*, 99 U. S., 57, the court said:

"It may be conceded that a railroad company has not power either to sell or *mortgage* its franchises or perhaps *the road* which it has been chartered to build, *without express legislative authority*, and this has in some cases been decided. The reason is that such a sale or *mortgage tends to defeat* the purposes the legislature had in view in the grant of the charter. The adventures who obtained the charter and who accept it, undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent they cannot throw off the obligation they have assumed."

Must have express authority to mortgage.

In *Thomas vs. West Jersey Railroad*, 101 U. S., 71-83 JUSTICE MILLER said:

"Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, *any contract which disables* the corporation from performing those functions which undertake *without the consent of the state* to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, *and is void as against public policy.*

Not voidable but void.

"So it has been held that a railroad company cannot make a valid mortgage of its property without the consent of the state; for *by foreclosure of the mortgage* the corporation would become disabled from performing its duties to the public." *Morawetz*, Sec. 1120.

Numerous authorities might be cited to this point, but it is unnecessary. We have made the above quotations simply to show that the underlying principle of law, which forbids a railroad company from mortgaging its property, is that by a *possible foreclosure of the mortgage* the company will be deprived of the use of the property necessary to perform its duties to the public.

This principle applies to the water works plant as well as to a railway. The language of Justice MILLER above quoted applies with as much force to the case at bar as it did to the facts in the case in which he rendered that opinion.

The logic of the principle of law underlying all these cases is that the property of the water works plant was not subject to mortgage.

If the mortgagor company had no power to make the mortgage unless by express statutory authority, the mortgage would be *wholly void*, and would support no action thereon by the trust company to foreclose the same.

We may apply the words of Mr. Justice GRAY, in *St. Louis Railroad vs. Terre Haute Railroad*, 145 U. S., 402:

Wholly void.

"This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years and was a contaact which neither corporation had the lawful power to enter into, *unless expressly authorized* by the state which enacted it, and which, if beyond the scope of the lawful powers of *either* corporation, was *unlawful* and *wholly void*, could not be ratified or validated by either or both, and would support *no action or suit* by either against the other."

See cases there cited.

Every public grant of privileges or franchise is to be construed against the grantee and in favor of the public.

Central Transp. Co. vs. Pullman Car Co., 139 U. S., 49:

Is void.

"ANY contract, therefore, whether *by mortgage* sale or lease which may deprive the company of its ability to perform its duty to the public, unless expressly authorized by statute is void."

Void.

JUDGE SANBORN in *Union Pacific Ry. Co. vs. C. R. I. & P. Co.*, 51 Fed. Rep. 317, said: "*Any contract* or *conveyance* of the corporation by which, without legislative authority, it disables itself from the performance of these functions, and from the exercise of its corporate powers is *against public policy and void.*"

So it was said in *Thomas vs. Railroad Company*, 101 U.

S., 83, "*any contract* which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, *is a violation* of the contract with the state and *is void as against public policy.*"

Void as against public policy.

In the case at bar we have no authority from the state to make the mortgage, no consent of the city of Omaha to make the mortgage, and not even any provision in the charter of the mortgagor company to borrow money or to make the mortgage.

Comment on some cases that may be cited by appellees to support the point that the company could lawfully mortgage the plant.

In *Williamette Co. vs. Bank of British Col.*, 119 U. S., 191, the mortgage was held valid, and for good reasons.

a The Williamette Woolen Manufacturing Company was not a corporation formed to supply water to a city as part of its municipal machinery, but to take water from a river for use by manufacturing companies. It was a private corporation.

b The company was incorporated under a special act of legislature, which gave it the power over its property "*to use and dispose of at pleasure.*"

See Sec. 2, p. 193 of opinion, and also Sec. 6, p. 193. The court so found the company had power to mortgage under these sections. p. 197 of opinion.

Salem Capital Flour Mills Co. vs. Stayton Water, Ditch & Canal Co., 33 Fed. Rep., 146, did not involve the question, and did consider the power of the company to mortgage. The facts in that case arose under the same charter rights stated in last above case.

MORTGAGES AND MECHANICS' LIENS—THE COURTS have

applied the same PRINCIPLES to mechanics' liens AND HELD, on the same GROUNDS of public policy that THE PROPERTY of water works companies ARE NOT SUBJECT to mechanics' liens.

Foster & Co. vs. Fowler & Co., 50 Pa. St., 27.

McNeal Foundry and Pipe Co. vs. Bullock, 38 Fed. Rep., 565.

Eufala Water Co. vs. Addyston Pipe and Steel Co., 8 So. Rep., 25.

Chapman Manf. Co. vs. Oconto Water Co., 89 Wis., 264.

The evil results that might arise under a judicial sale, under either a mortgage or mechanic's lien are not to be overlooked. So it was said in *Foster & Co. vs. Fowler, et al*:

"In the able argument of the learned counsel of the plaintiff in error it was claimed that we should consider the question of lien without reference to its possible enforcement. *This would be too abstract and unpractical; for the lien abstractly is nothing—its consequences or results, everything. The fruits of a lien are what the plaintiffs* in error are contending for. We cannot, therefore, look at a question of a lien *without reference to the legal consequences of it*, and if they would *necessarily contravene settled principles, it is evident that such an effect should not be given and was not intended by the law;* and if it be incapable of the practical results assigned by law to it, it is *inoperative, is no lien.*"

Water works companies may be compelled to furnish water to all the inhabitants of the city without discrimination, and rates must be reasonable and may be regulated by law in the same manner and to same extent as railway companies are regulated.

See *Portland Nat. Gas & Oil Co. vs. State*, 8 Am. Ry. & Corp. Rep., 640; and cases cited in note to said case, p. 644, and particularly No. 3, p. 648.

Even if the statutes of Illinois gave the company power to mortgage, such power would not extend to the Nebraska property under the circumstances of this case.

We do not combat the general rule that a corporation of one state takes it charter powers with it when it goes into another state to do business, but there are some exceptions to this rule, notably when such powers are against the laws and policy of the stranger state. See authorities hereafter cited in support of this point.

The issuing of the bonds and mortgage was the culminatian of a scheme to evade the laws of Nebraska, of which the bondholders had notice.

Let us state a few facts.

1. There is no statute of Nebraska authorizing a mortgage upon the plant of the Water Works Company.

2. The Nebraska corporation was already indebted in the sum of $400,000, being two-thirds of its capital stock of $600,000.

3. Treating the company as a private corporation, it could not contract any further indebtedness.

Chap. 16, § 128, Nebraska Statutes:

"The articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation shall at any one time be subject, which must in no case exceed two-thirds of the capital stock."

4. The creation of the Illinois corporation was a confessed scheme, promoted by the holders of stock of the Nebraska corporation for the confessed purpose of evading the laws of Nebraska, and increasing the corporation indebtedness.

See testimony of C. H. VENNER, pp. 212–214, and letter of Underwood, p. 213.

5. The scheme also contemplated the turning over of the

stock of the Nebraska corporation, $600,000 to the Illinois corporation, in exchange for a new issue of bonds to the amount of $1,200,000. p. 196, folio 256.

6. The bonds and mortgage contain such recitals as would give actual notice of these infirmities.

Could these things be legally accomplished under the guise of incorporating under the laws of Illinois? We think not, for the following reasons:

1. The laws of Illinois did not justify the making of the mortgage on the Omaha plant.

2. The laws of Illinois did not justify the article in the Articles of Incorporation purporting to authorize the company to buy the plant or stock of the Nebraska corporation, but, on the contrary, the article was void and the act of the company *ultra vires*.

For copy of article see p. 126 of record.

3. It is against public policy for persons to incorporate in one state for the sole purpose of doing business in another state, where the doings of the company and the provisions of its charter are against the policy of the state where business is to be carried on.

The second point has been decided in the case of *People ex rel. vs. Chicago Gas Trust Co.*, 130 Ill., 268. The articles of incorporation of the Chicago Gas Trust Company in terms authorized the company to erect and operate gas works in Chicago and other places in Illinois, and "to purchase and hold or sell the capital stock" of other gas companies.

The article in the charter of the mortgagor company is almost identical.

It was ruled in above case that the laws of Illinois did not authorize the creation of a corporation to buy or hold the stock of other corporations, and that the same was illegal and void.

The court said:

"Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between buying stock and manufacturing gas. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other corporations is not necessary to accomplish such purpose. 'The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a similar kind of business,' "(I. Morawetz on Priv. Corp., § 431).

No power in Illinois Co. to buy stock of Nebraska Co.

* * * * * * *

"If, then, the power to purchase outside stocks cannot be implied from the power to operate gas works and make and sell gas, a company to whom the latter power has been expressly granted cannot exercise the former without legislative authority to do so. This is the law, as well settled by the great weight of authority."

* * * * * * *

"The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? We think not."

Can only come from Legislative grant.

* * * * * * *

"Our conclusion upon this branch of the case is that, if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas works and manufacturing and selling gas, it has no power to purchase or hold or sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation."

No such power even if recited in articles of incorporation.

In support of the third point, that it was against public policy for the owners of the capilal stock of the City Water

Works Company of Omaha to re-incorporate under the laws of the state of Illinois for the purpose of evading the provisions of the laws of the state of Nebraska, we note, in addition to what appears upon the face of the papers that the proof is that the mortgagor company never owned any property in the state of Illinois, and that its promoters never intended to own any property in the state of Illinois, or to do any business in the state of Illinois. Their aim was to evade the limitation upon the power of the company to become indebted in an amount beyond two-thirds of its capital stock.

See testimony Venner, pp. 212 to 215.

An undisputed fact.

To sustain the mortgage is to sanction and justify this illegal proceeding. Whereas there are no *bona fide* holders of bonds for value without notice, we feel at liberty to make this defense and to ask the court to declare the mortgage to be null and void.

Morawetz § 965, states:

"To obtain a charter for the purpose of evading the laws of a foreign state under cover of the rule of comity would be a fraud upon the state granting the charter, and to attempt to act under such charter in the foreign state would be a fraud upon the latter."

A fraud on both states.

See also *People vs. Howard*, 50 Michigan, 239.

In *Montgomery vs. Forbes*, 148 Mass., 249, it was held that where a citizen of Massachusetts incorporated a company in New Hampshire, and stated in the certificate of incorporation that the chief place of business of the company was to be in a city in the state of New Hampshire, it being proven in fact that all the business was carried on in the state of Massachusetts, and that the associates of the promoter were dummies holding one share of stock each, that such corporation was illegal and void.

In *Hill vs. Beach*, 12 N. J. Eq., 31, it was held that a corporation could not become incorporated under the laws of New York for the purpose of carrying on all its corporate

transactions in the state of New Jersey. In that case the court said:

"The corporation cannot be recognized by any court in New Jersey as a legally constituted corporation nor be dealt with as such. If it can be, what need is there of any general or special law in our state? Individuals desirous of carrying on any manufacturing business may go into the state of New York, organize under the general laws of that state, erect all their manufacturing establishments here, and under their assumed name transact their business not only free from all personal responsibility, but under cover of a corporation not amenable to our laws."

In *Empire Mills vs. Alsten & Co.*, 15 S. W. Rep., 200 (Texas, 1891), it was ruled that persons who organized a corporation in the state of Iowa for the sole purpose of doing a mercantile business in the state of Texas were liable as partners, the laws of Texas not authorizing incorporation for such purposes.

In Canada it is held that no state can validly authorize a body corporate to transact business out of its own territory.

Bank of Montreal vs. Bathune, 4 U. Can. Q. B., 341.

Genesee Mutual Insurance Company vs. Westman, 8 Up. Can. Q. B., 487.

Union Rubber Co. vs. Hibbard, 6 Up. Can. C. P., 77.

Land Grant Railway and Trust Company vs. Coffey County, 6 Kan., 245, is a case where a corporation was organized in Pennsylvania and authorized to do business anywhere except in the state of Pennsylvania. The court of Kansas refused to recognize its corporate character. There the court said:

"No rule of comity will allow one state to spawn corporations and send them forth into other states to be nutured

and to do business there when said first mentioned state will not allow them to do business within its own boundaries."

What force is there in the provision of the statute of the state of Nebraska which provides that corporations shall not become indebted in an amount beyond two-thirds of their capital stock if the promoters of the scheme can reincorporate in the state of Illinois and then come back into Nebraska and do business and become indebted in bonds and mortgage to the amount of four million of dollars, when they otherwise could not lawfully have become indebted in an amount beyond four hundred thousand dollars?

In an article in the American Law Review, Vol. 25, No. 3, a writer states:

"Why should one set of citizens, because of their love of and loyalty to home be taxed or otherwise more harshly treated than their next door neighbors who are willing for some supposed advantage to sail under a foreign flag? If a Massachusetts man wants to do business in Massachusetts, why not do so under the laws of Massachusetts? If he prefers the laws of New Jersey, why not go to New Jersey and stay there? Otherwise, of what use is it to pass laws in Massachusetts? If the laws are harsh they should be changed. Harsh or unjust laws generally result in injury to the state that passes them, and are likely to be the sooner repealed if there is no way of escaping them.

In the same article the writer further states:

"The evil complained of is not that a state sends its own citizens forth as a corporation; it is that a state permits the citizens of another state to resort to it for incorporation to do business in that other state, thus granting them rights which presumably they could not get at home."

The evil we complain of is one of rapid growth in these modern times. The state of New Jersey has most liberal laws touching the formation of corporations. New Jersey apparently invites persons to come to that state and incorporate for the purpose of doing business anywhere else in the union. The

record in this case furnishes an illustration. The American Water Works Company of Illinois, wanting to exercise even wider powers than permitted by the state of Illinois, was reorganized in the state of New Jersey. The New Jersey company, becoming financially involved, proceedings were begun in New Jersey to wind up the corporation, and a receiver was appointed in New Jersey and sent out to Nebraska to manage the corporate property located in this state. The mere statement of the case illustrates the evil of recognizing the legality of what we may properly term "tramp corporations." The only safe rule is to say to people who want to transact business in the state of Nebraska alone, that they should incorporate in that state in compliance with its laws. The case is clearly distinguishable from a case where people become incorporated in one state for the purpose of transacting business in the state of its incorporation and then enlarge its business by extending the same into sister states. Even in the last case mentioned a foreign corporation should not exercise powers in the sister state not granted to its own corporations.

In the case at bar, however, the very persons who owned the stock of the City Water Works Company of Omaha reincorporated the company under the laws of the state of Illinois and then made a mortgage upon its Nebraska property not allowable under the laws of Nebraska, and then had delivered to its promoters substantially all of the bonds as shown by the record in this case. If a case could be made upon record which shows an illegal and unauthorized issue of bonds and a mortgage it is the case at bar.

The water works company incorporated under the laws of Illinois could not make a mortgage upon the water works plant in Nebraska unless the same was in harmony with the policy of Nebraska, and not

in excess of the power that might have been exercised by it if incorporated under the laws of Nebraska.

Illinois Co. could do no act in Nebraska forbidden to home Co.

a. If a Nebraska corporation could not have mortgaged the Omaha water plant, the Illinois company could not do so.

b. If the Nebraska corporation could not issue bonds in amount beyond two-thirds of its capital stock, the Illinois company could not do so.

c. If the Nebraska corporation must file a copy of its articles of incorporation with the secretary of state before it could transact any business or have any corporate existence, the Illinois company must so file a copy of its charter before it can do any business in Nebraska.

"Accordingly it has been held that foreign corporations have no right, by the law of comity to do acts within a state which are prohibited by the laws of that state to its own citizens or corporations engaged in a similar business." *Morowitz* § 964.

Commonwealth vs. N. Y. and C. R. R., 129 Pa. St., 463 (15 Am. St. Rep., 724):

Subject to limitations in Nebraska laws.

"When a foreign corporation comes into Pennsylvania and engages in business here undoubtedly it does so *subject to the general policy* of and course of legislation in the state."

In *Carroll vs. The City of East St. Louis*, 67 Ill., 568, it was held that a Connecticut land company could not purchase and hold titles to lands in the state of Illinois, for the reason that if permitted to exercise its functions in Illinois to the full extent authorized by its charter, it could acquire lands without limit as to quantity and hold them in perpetuity; that such privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities.

In *U. S. vs. Fox*, 94 U. S., 315, it was held that a devise of lands in the state of New York to the government of the

United States was void for the reason that under the constitution of New York a devise on lands in that state could only be made to New York persons and to such corporations as were created under the laws of the state of New York.

Larwell vs. Hanover Savings Fund Society, 40 Ohio State, 274, is a case where a corporation formed under the laws of Ohio under the name of the Newark Coal Company made its note which was discounted by the Hanover Savings Fund Society, a corporation of Pennsylvania. The corporation under the laws of Ohio was authorized to borrow money on the credit of the corporation not exceeding its authorized capital stock, and at a rate of interest not exceeding that of natural persons, to-wit: eight per cent. The notes, however, were discounted by the Savings Fund Society at the rate of ten per cent per annum, which was also in excess of the legal rate of interest in the state of Pennsylvania. It was held in a suit upon the note that the Hanover Savings Fund Society could not recover for the excessive rate of interest.

A corporation of the state of Illinois has no right by the law of comity to do acts or make mortgages on property within the state of Nebraska which are not allowable by the laws of Nebraska to its own corporations engaged in a similar business.

In *People vs. Howard*, 50 Mich., 239, it was said:

"Corporations organized under the laws of other states to engage in and carry on business not open to citizens generally cannot carry on business in this state except permission, either expressed or implied, is given to them so to do." (*Thompson vs. Waters*, 25 Mich., 214; *Home Insurance Co. vs. Davis*, 29 Mich., 238.)

Michigan holds public policy forbids this.

"Even if we might indulge in the presumption that the insurance company referred to might, in the absence of all legislation, carry on business in this state, yet that it might be prohibited from so doing is clear, and this may be found

in the *direct enactments* of the legislature of this state, or by the *public policy* of the state deducible from the general course of legislation pertaining to such matters."

Illinois do no bras bidder Co.

In *United States Trust Company vs. Lee*, 73 Ill., 142, it was said:

"The question whether *foreign* corporations may purchase and hold real estate in this state beyond what is necessary for the transaction of their business or in the collection of their debts was presented to this court in the case of *Carroll vs. the City of East St. Louis*, 67 Ill., 568. It was held in that case that such a power did not exist, it being contrary to a sound public policy. * * * We are unable, after a careful consideration of all the cases presented by this record, on principle, to distinguish it (this case) from the former decisions of this court. It is apparent that to permit such bodies to hold lands in unlimited amounts and for indefinite periods of time would be attended with all the inconveniences, if not greater, than to permit them to hold in their own right, and it would, we think, operate as a *violation of our statute* which has limited the amount and time such bodies may hold land, as well as the purpose for which it may be acquired. * * * It is manifest that the legislature intended to prohibit such bodies from acquiring or holding real estate except so far as might be necessary for the transaction of their business, or such as might be purchased in satisfaction of claims and indebtedness in favor of the corporation. The enactment operates as a prohibition and applies as well to domestic as to foreign corporations. * * * Now, this is a foreign corporation proposing to transact business in this state, and asks the court to invest it with title to a large quantity of real estate, not that it may hold the same for any of the purposes named in the fifth section of the act, but for another and different purpose, and one that is prohibited by the twenty-sixth section."

Subject tation breaki

Illinois law forbids this privilege to foreign corporations.

In *U. S. Mortgage Company vs. Gorss et al.*, 93 Ill., 483, it was ruled:

"It is the policy of the general incorporation law of 1872 that corporations should not be formed in Illinois for the business of loaning money, and foreign corporations are denied the exercise of any powers in the state which are pro-

hibited domestic corporations. Therefore a loan of money by a foreign corporation secured by a mortgage on real estate in Illinois was held invalid."

Pennsylvania Co. vs. Bauerle, 143 Ill., 459, is a case where it was held, as stated in the 12th paragraph of the syllabi:

"Where the general laws of this state provide for the organization of corporations, foreign corporations of like character doing business in this state shall exercise no greater or different powers and shall be subject to the same restrictions, liabilities and duties."

There are many cases to the point that where a foreign corporation makes a contract in another state not authorized by the laws of that state, that such contract is illegal and void. See the following:

Re Comstock, 3 Sawyer, 218.
Bank of Bristol vs. Page, 6 Oregon, 431.
Semple vs. Bank, &c., 5 Sawyer, 88.
Oregon vs. Rathburn, 5 Sawyer 32.
Union Central L. I. Co. vs. Thomas, 46 Ind., 44.
Farmers' and Merchant's Insurance Co. vs. Harrah, 47 Ind., 236.

COMMENT.—These authorities, and many more that might be cited, are based on the principle:

a. That a foreign corporation cannot exercise any powers in Nebraska that could not be exercised by a Nebraska corporation. Hence, if a Nebraska corporation could not make a mortgage upon a water works plant situated in the state, a foreign corporation could not make such a mortgage.

b. If a Nebraska corporation would be without authority to create any indebtedness by way of mortgage or otherwise beyond two-thirds of its capital stock, which in the present case would be limited to $400,000, then the Illinois corpora-

tion could not make a mortgage upon the property in Nebraska beyond the said $400,000.

The words, "their assigns," in Sections 1, 7, 8 and 10, in Ordinance 423, is not a grant of authority to water company to mortgage the plant.

See pp. 150, 152, record.

The word "assigns" is but a designation or reference to persons to whom property may be legally transferred. It is not a grant of authority to make such transfer.

So, in the case at bar, the word "assigns" in the ordinance is not a grant of authority to make a mortgage or to transfer the title, but is a designation of persons to whom the title of the property may legally pass, but the power to pass the title is not granted by the word "assigns," but must be found elsewhere, otherwise it does not exist.

In the case at bar the city of Omaha had a right to contract with whom it pleased for the construction and maintenance of a system of water works. Under Ordinance 423, or independent of that ordinance, the city could consent to the transfer of the water plant to a third person with whom the city was willing to enter into a new contract for the continuance of the water supply.

This, however, would not be a grant of authority to the water company to transfer the plant to whom it pleases without the consent of the city, which would be the inevitable result arising from a mortgage foreclosure.

We know of no case in the books, nor do we believe one can be found, which holds that the use of the word "assigns" is an affirmative grant of power to make transfer of property.

That the use of the word "assigns" is not such grant, authority has been settled by the Supreme Court of the United States in a case similar in every point of view.

Oregon Railway Company vs. Oregonian Railway Co., 130 U. S. 1, 29, 31. The Oregonian Railway Company by an Act of the Legislature was granted certain rights of way and privileges in the city of Portland. In this act was found the words "its assigns" from which it was argued the railway company was thereby granted the right to sell or lease its property.

On the meaning and import of the words "assigns" the Court said:

"But whatever may have been the intent in the minds of the legislators in using these words, it is not precisely the form in which we would expect to find a grant of the power to sell, to lease, or to transfer the title, ownership or use of railroad lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another." (p. 30.)

"Naturally we would look for the authority to do these things in some express provision of law. We would suppose if the legislature saw fit to confer such rights it would do so in terms which could not be misunderstood. To infer, on the the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word "assigns," a very loose and infinite term, is a stretch of the power of the Court in making implications which we do not feel to be justified." (p. 30.)

"In using these terms they may have thought that authority might be given by future statutes, either generally to all corporations or to some special organization, to sell or transfer the corporate property or some part of it. But whatever may have been their purpose, we think the argument is a forced one, which would vest in railroad companies the general power to sell or lease their property or franchises, or to make contracts to buy or take leases of the same from other railroad corporations, from the use which is made of these indefinite terms "successors or assigns." (p. 31.)

ESTOPPEL.

The American Water Works Company is not

estopped from making the defense that bonds and mortgage are void:

a. The recitals in the bonds and mortgage give ample notice to all persons.

b. The bonds were not sold by the Trust Company, but were delivered to the stockholders and officers of the water company.

c. There is no proof that there were any bona fide holders for value of any of the bonds.

RECITALS IN MORTGAGES:

1. That the Illinois Company has purchased the Omaha plant from the Nebraska Company including its contract with the city of Omaha. (p. 20, folio 26.)

2. Has assumed the debts of the Nebraska Company. (p. 20, folio 26.)

3. The Illinois Company has deemed it essential to make certain improvements and enlargements to the Omaha plant. (pp. 20, 21, folio 26.)

4. Reasons recited in mortgage for executing the same and issuing bonds are to accomplish above ends. (p. 21, folio 27.)

5. Recites amount of money needed to pay for and improve the Omaha plant so purchased of Nebraska corporation and to comply with its contract with the city. (p. 22, folio 28.)

6. The mortgage covers the water works plant so purchased from the Nebraska corportion, situated at Omaha City, Nebraska, together with the contract with the city and no other property. (p. 24, folio 31.)

Recitals in bonds: p. 26.

"For further extensions, improvements and enlargements of the water works at Omaha, Nebraska, all of which bonds are secured by a duly authorized, executed and recorded deed

of trust, bearing even date herewith, conveying the property real and personal of said corporation, located in the County of Douglas and State of Nebraska, in and about the City of Omaha, including its income from the water works by which the City of Omaha, and the inhabitants thereof are supplied with water, and the franchise therefor, to the said The Farmers Loan & Trust Company in the City of New York, trustee."

ion.

Here is ample and specific notice of the facts on which we base the want of authority to execute the mortgage.

The trust company and bondholders bound to take notice of the recitals in the bonds and mortgage and of the laws of the states referred to in the mortgage.

Must take notice of recitals

In *Stanton vs. the Ala. & Chattanooga Ry Co.*, 2 Woods, 523. WOODS, C. J., said:

"The holders of the bonds were bound to take notice of what was contained in or endorsed upon their bonds; they were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage."

d whole
ithout
f sale.

Jones on Mortgages, § 557.

Guilford vs. Minn. & C. Ry. Co., 51 N. W. Rep., 658.

Stanton vs. Ala. & C. R. R., 2 Woods, 523.

Skiddy vs. Atlantic R., 3 Hughes, 320-356.

And of the laws of the states named.

Morgan vs. U. S., 113 U. S., 476.

Gilman Sons & Co. vs. N. O. Selma Ry., 72 Ala., 566.

Morton, Bliss & Co. vs. N. O. Selma Ry., 79 Ala., 590.

Commonwealth of Va. vs. Ches. & Ohio Canal Co.,
32 Md., 501.

Illinois do no bras bidder Co.

To the point, there is no proof of any bona fide holders of bonds for value without notice.

We have called attention to the notice contained in the bonds and mortgage.

The trustee did not sell the bonds, but turned them over to the following persons: (p. 166, 167, 168.)

Officers of Company.

W. T. Hatch & Sons	$ 50,000
Wilson, Colson & Co	50.000
W. & P. Smith	285,000
Woodbury & Moulton	65,000
C. H. Venner & Co	3,150,000

C. H. Venner was the only member of last named firm when bonds to amount of $2,300,000 were received by him. (p. 184.) He was the promoter of the scheme and a director in the company. (p. 184.)

Subject tation brask

W. A. Underwood who was a nominal member of Venner & Co., when the remaining $850,000 were delivered, was also a promoter and president of the company. (pp. 184, 185.)

Winthrop Smith was also a director. (p. 185.)

Of the bonds delivered to Venner $1,200,000 were in exchange for the stock of the City Water Works Company. (p. 185.)

There is no evidence in the record that any of the persons to whom the bonds were delivered by the Trust Company, paid any consideration therefor, except the stock by Venner above mentioned.

The only proof of sale of bonds to any person, at any time is stipulation No. 4 to wit: (p. 210.)

"It is further agreed that Venner negotiated and sold a large part of the bonds in controversy:" Stipulation.

How many? When? Which of the bonds? What consideration? Had the bonds been dishonored when sold? Had the purchasers notice of their infirmities?.

This stipulation falls far short of proving bona fide holders for value without notice.

No Forfeiture of the Mortgage.—There is neither averment nor proof of facts sufficient to justify a foreclosure under the terms of the mortgage. The terms of the mortgage are: "And for the purpose of securing the payment to the holders of so many of said bonds *as shall be negotiated* and *sold* or exchanged pursuant to the terms of the resolutions aforesaid." The word "exchanged" refers to the bonds that were to be exchanged for the $400,000 first mortgage bonds. Hence the mortgage can only be foreclosed to secure such bonds as have been "*negotiated* and *sold*." There is no averment that any of these bonds were ever *negotiated* or *sold*. On the contrary, the proof is that the trust company delivered the bonds to officers of the mortgagor company. These facts have been sufficiently argued *supra*. P. 30, record. Negotiated and sold. How find whole due without proof of sale.

Without further proof how can the decree stand that directs finding and payment of the whole issue of the bonds, whether sold or not sold?

Trust company should have proven that the bonds had been sold to bona fide holders for value.

a. By the terms of the mortgage there could be no forfeiture without proof that the bonds have been negotiated and sold.

b. Certainly under the many objections we have made to the right of the mortgagor company to issue the bonds and mortgage upon the water works plant, the burden of proof

was shifted upon the complainant to show that the bonds had passed into the hands of *bona fide* holders for value without notice of their infirmaties.

Lytle vs. Lansing, 147 U. S., 59, settled the law on this point:

Even though good on their face.

"As the bonds in this case, though good upon their face, were undoubtedly void as between the railroad company and the town of Lansing, it is incumbent upon the defendent Lytle to show that he, or some one through whom he obtained title to them, was a *bona fide* purchaser for a valuable consideration. *Orleans vs. Platt*, 99 U. S., 676."

* * * * * * *

No such proof in this case.

"It was further held that the actual illegality of the paper being established, it was incumbent upon the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover. In such a case, however, the plaintiff fulfills all the requirements of the law by showing that either he or some person through whom he derives title was a *bona fide* purchaser for value without notice. *Douglas County Commissioners vs. Bolles*, 94 U. S. 104; *Montclair vs. Vamsdell*, 107 U. S., 147; *Scotland County vs. Hill*, 132 U. S., 107."

* * * * * * *

Applies to bonds.

"As early as in 1823 it was held by this court in *Wormley vs. Wormley*, 8 Wheat., 421-449, 'to be' a settled rule in equity that a purchaser without notice, to be 'entitled to protection must not only be so at the time of the contract of conveyance, but at the time of the payment of the purchase money.' Such is undoubtedly the law. *Swayse vs. Burke*, 12 Pet., 11; *Tourville vs. Naish*, 3 P. Wms., 306; *Paul vs. Fulton*, 25 Missouri, 156; *Dugan vs. Vattier*, 3 Blackford, 245; *Patten vs. Moore*, 32 N. H., 382; *Blanchard vs. Tyler*, 12 Michigan, 339; *Palmer vs Williams*, 24 Michigan, 328; *Jackson vs. Caldwell*, 1 Cowen, 622. It is insisted, however, that this principle has no application to the purchase of negotiable instruments like the bonds in question. We know of no such distinction, however, and in the case of *Dresser vs. Missouri & Iowa Railway Construction Co.*, 93 U. S., 92, the rule was expressly applied to a purchaser of negotiable paper. In that case the plaintiff purchased the notes in controversy and paid $500 as a part of the consideration before notice of

any fraud in the contract; and it was held that if, after receiving notice of the fraud, he paid the balance due upon the notes, he was only protected *pro tanto*; that is, to the amount paid before he received notice, citing *Weaver vs. Barden*, 49 N. Y., 286; *Crandall vs. Vickery*, 45 Barb., 156; *Allaire vs. Hartshorn*, 1 Zabr. (21 N. J. Law), 665.

The cases in which the doctrine of estoppel applies, are cases where there was *apparent authority* to make the mortgage, and where the bonds were sold to *bona fide holders for value* without notice and where the company received the proceeds from the bonds.

Suffice it to say this is not such a case.

No estoppel beceuse the bonds not negotiable instruments.

NON-NEGOTIABILITY OF THE BONDS.—On the face of the bond appears the two following provisions:

a. This bond is one of a series of four thousand of like tenor and effect, amounting to the sum of four million dollars, first consolidated mortgage bonds, authorized to be issued by the American Water Works Company, two thousand of which numbered from 2,001 to 4,000, both inclusive, amounting to two million dollars, are placed in trust with the said Farmers' Loan and Trust Company for further extensions, improvements and enlargements of the water works company at Omaha, Nebraska. P. 26, record.

b. "The American Water Works Company reserves the right, when the said two million dollars of bonds so placed in trust are issued, to reduce the rate of interest thereon or on any part thereof to five per cent per annum."

COMMENT: There is nothing on the face of the bond to show when the $2,000,000 of bonds deposited in trust under the above proviso shall be issued, negotiated or sold. All the bonds, according to the form thereof, bear date the first day of July, 1887. According to the proviso in the bond, however, if the bond was one of those beginning with number

The bond contains proviso that destroys negotiability.

2,001, it was not authorized to be issued on the day it bears date, as that would be in violation of the trust expressed on the face of the bond, and yet there is nothing to be found on the face of the bond to show when the conditions of the trust would be or had been complied with. This renders the obligation uncertain, indefinite, complex, dependent upon the happening of events or contingencies.

Dependant on contingencies.

A naked and arbitrary power is reserved in the maker of the bond, to reduce the interest from six to five per cent without consulting anybody. Mark you, the proviso is not that the rate of interest may be reduced on the two million dollars of bonds before they are issued, but on the contrary, the language conveys the idea that after the bonds are issued the maker of the bonds reserves the right to reduce the interest on such number thereof as may please the fancy of the maker.

The reducing of interest is not definite but discretionary.

The purchaser of each bond would take a bond which on the face thereof called for six per cent.

How was that thirty dollar coupon to be changed to a twenty-five dollar coupon?

Who was to know upon which or how many of said bonds the reduction of interest was to be made?

These conditions and provisos appear upon the face of each and every bond, and destroy their negoliability.

It is no answer to the suggestions to say that it may have been the intention by the terms of the mortgage that the trust company should change the coupon from a thirty dollar to a twenty-five dollar coupon before the two million dollars of bonds should be issued. We cannot look to the terms of the mortgage to determine the question in hand, but must confine ourselves to what appears on the face of the bond, as it is the bond which is the negotiable instrument, and not the mortgage.

Must look to terms of bond only.

In *Windsor Savings Bank vs. McMahon*, 38 Fed. Rep., 283, Judge Shiras held: To render a note negotiable under the law merchant the amount to be paid at maturity must be ascertainable from the face of the note, without resort to evidence *de hors* the instrument. In his opinion he said:

"If we adhere to the principle that to render a note negotiable the amount to be paid at maturity must be ascertainable from the face of the note, without resort to evidence *de hors* the instrument, we have a fixed and certain rule for guidance; but if we depart from this principle, doubt and uncertainty will arise as to the true character of notes and other like instruments for the payment of sums dependent on contingencies."

Cannot look beyond the bond.

The above case was an action to foreclose a mortgage to secure the payment of a promissory note for fourteen thousand ($14,000) dollars, with interest installments of four hundred and ninety ($490) dollars each six months, "both principal and interest payable at the office of J. W. & E. L. Squire, Council Bluffs, Iowa, *with exchange on New York.*" It was held that the provision for exchange rendered the amount uncertain and destroyed the negotiability of the paper.

"Paper to be negotiable under the law merchant must define by its terms what the obligation of the maker is, so that as it passes from hand to hand in the business world it may be ascertainable from the face of the instrument what is demandable from the maker."

Must find amount to be paid from face of bond.

Cases holding that a proviso for change in rate of interest destroys negotiability.

Heagler vs. Comstock, 8 Law Rep. Ann., 393.

Lamb vs. Storey, 45 Mich., 488.

Cayuga Co. Bank vs. Purdy, 56 Mich., 6.

Contracts interpolated affecting time or condition of issuing as well as payment or authorizing a change in rate of

interest at the will or option of maker destroy the negotiability of the instrument.

Cayuga Co. Bank vs. Purdy, 56 Mich., 6: in which court said:

"The modern tendency to interpolate into such instruments, engagements and stipulations not recognized by the law merchant, affecting the certainty as to the amount due and payable thereon, or the time of maturity, or superadding duties to be performed by the maker, or additional obligations other than the payment of a sum certain at maturity, should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts. Otherwise, it is difficult to see where the line of distinction is to be drawn, and it may be apprehended that in a few years, as one clause after another is engrafted onto the original terms of such instruments, any contract payable to order, no matter how uncertain or cumbersome its provisions may be, will be held to be negotiable paper, and the holder entitled to all the benefits and protection of *bona fide* holders of commercial paper."

Interpolating contracts condemned.

"Our conclusions are that the instrument introduced in evidence in this suit is not a negotiable promissory note, and the plaintiff is not entitled to recover thereon as such. In what we have said we are not to be understood as expressing any opinion on the legal validity of the special clauses or stipulations added to this note, or any of them. It is enough for the purposes of the question now decided, that the parties have superadded to their note certain special stipulations which they must be understood to have relied upon as having validity; and if that was their understanding, they could not have meant that the contract should be a promissory note. We dispose of the case upon this manifest intent of the parties."

Stipulations destroy negotiability.

See also cases equally strong:

Woods vs. North, 84 Pa. St., 407.

Continental National Bank, 73 Wis., 332.

Way vs. Smith, 111 Mass., 525.

The condition on the face of the bonds in suit, particu-

larly that clause providing for the trust company holding two million dollars of the bonds in trust destroys their negotiability.

In *Iron City National Bank vs. McCord*, 139 Pa. St., 52, it was said:

"It is well settled that anything written or printed on a negotiable instrument prior to its issuance by the maker relating to the subject matter of the instrument, and tending to restrain or qualify it must be regarded as part of the contract intended to be evidenced thereby. * * *

What is written on face of bond destroyed negotiability.

Speaking for the court in that case, Mr. Justice Lord said: "It is well settled by an uninterrupted series of decisions that any language put upon any portion of the face or back of a promissory note by the maker, before delivery is part of the contract; and if by any such language the payment of it is not necessarily to be made, at all events and of the full sum in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable." * * *

As was said in *Woods vs. North*, 84 Pa. St., 407, 24 Am. Rep., 201: "It is a necessary quality of negotiable paper that it should be simple, certain unconditional, not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises, and the decided cases which have established this principle. * * *

"If this is not done, such paper would soon cease to be a 'courier without luggage,' and become loaded down with conditions, contingencies, and all sorts of *impediments*, so that its usefulness would be greatly impaired, if not entirely destroyed."

Must be courier without luggage.

Kingsbury vs. Wall, 68 Ill., 311.
Van Zant vs. Hopkins, 151 Ill., 248.
Smilie vs. Stevens, 39 Vt., 315.
Benedict vs. Corden, 49 N. Y., 396.
Chouteau vs. Allen, 70 Mo., 339.

There are many more cases which might be cited in support of the general proposition that anything on the face of the bond

which entitles the *maker to reduce or change* the amount of *interest* renders the amount to be paid uncertain and makes the bond non-negotiable. It is likewise true that any provision on the face of the bond by which it is rendered uncertain whether the bond shall *ever be relieved from the trust obligation* resting upon it renders the bond *uncertain as to* whether it shall ever become an *outstanding obligation*, or whether the time shall ever arrive *when it may be negotiated*, such fact renders the bond non-negotiable.

Receivers Hunt and Clarkson not estopped to defend against mortgage foreclosure.

Alonzo B. Hunt was the receiver, not of the property, but of the carporation, clothed with all the powers originally granted to E. Hyde Rust. See order of appointment. (p. 218.)

"It is further ordered that Alonzo B. Hunt be and is hereby appointed temporary receiver of the American Water Works Company of New Jersey."

Hunt as such receiver was in the possession of the water works plant. (p. 210, No. 9.)

Thaddeus S. Clarkson was appointed asscillary reciver of the Illinois company (p. 253-254) and instructed to defend all actions against the company. (p. 254.)

Such receivers represent creditors as well as the corporation and may defend or maintain a bill to set aside a mortgage.

Att'y Gen'l vs. Guard Mut. Life Ins. Co., 77 N. Y., 270.

Gillett vs. Moody, 3 Comst., 479.

Vail vs. Hamilton, 85 N. Y., 453.

In the last above cases the action was by a receiver of a corporation to set aside a mortgage made by it, and it was held that the action was well brought by him.

In *Att'y Gen'l vs. Guard Mut. Ins. Co.*, *supra*, it was said:

"It is the settled doctrine that the receiver of an insolvant corporation represents not only the corporation, but also creditors and stockholders, and that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation, made by its agents or officers, or to recover its funds or securities invested or misapplied."

SALE OF CONTRACT.

Error in that part of decree which directs a sale of the contract with the city of Omaha.

In no event could this franchise granted by the city be either mortgaged or sold at judical sale.

No statutory authority for it and it lacks the consent of the city.

The franchise to lay water mains in the streets, and supply water to the city and inhabitants and to collect pay therefor is like a franchise to collect tolls and cannot be mortgaged or sold.

In *Gue. vs. Tide Water Canal Co.*, 24 How., 257, *Taney*, C. J., said:

"Now it is very clear that the franchise or *right to take toll* on the boats going through the canal *would not pass* to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot upon the settled principles of the common law be seized under a *fieri facias*. If it can be done in any of the states, it must be under a statutory provision of the state and there is no statute of Maryland changing the common law in this respect."

It is this contract which gives the company the right to lay mains in the streets, to collect water rents, etc. Without this corporate franchise the water works plant would be worth-

less. It is this franchise which the company had no legal power to mortgage.

BEACH, § 389:

"A corporation created for a public purpose, such as constructing, owning and managing a railroad for the accommodation and benefit of the public *cannot, without distinct legislative authority* make *any* aliénation, absolute *or conditional*, either of the general franchise to be a corporation *or of the subordinate franchise to manage and carry on its corporate business* without which its franchise to be a corporation can have little more than a nominal value."

Nor of franchise to do business.

In the case at bar, the mortgagor company attempted to make a conditional alienation of its franchise granted by the city of Omaha.

WORDS OF MORTGAGE.—"All its privileges, franchises; easements * * * in the county of Douglas, state of Nebraska. * * * And also all rental, debts, dues, * * * * including water rents from the said city of Omaha, under and by virtue of a contract made between the said city of Omaha and one Sidney E. Locke," etc.

In *Black vs. Delaware and R. Canal Co.*, 24 N. J. Eq., 465, Mr. Justice VAN SICKLE said:

"It may also be considered as settled that a corporation cannot lease or dispose of *any franchise* needful in the performance of its obligations to the state without legislative consent.' In *Stockton vs. Central Railroad Co.*, 17 L. Rt. A., 97, Chancellor McGill used the same language applied to a lease of a railroad company. So JONES ON MORTGAGES, § 125: 'They cannot mortgage their *franchises* or property essential to continued operation of the roads without legislative authority.'"

In *Commonwealth vs. Smith, et al.*, 10 Allen, 448, which was a mortgage foreclosure, HOAR, J., said:

"The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. * * * Having once established its road, if that and *its franchise* of

managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important function is at an end."

So in *Richardson et al, vs. Sibley, supra*, a mortgage case, GRAY, J., applied the same rule to the "general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal existence." And again, in speaking of the franchise to take toll, he said: "It would be more accurate to say that such a *franchise* could not be sold or *mortgaged*," etc.

Franchise to collect rents cannot be mortgaged.

The same policy prevails in Illinois, the home of the mortgagor company. See *People vs. Chicago Gas Trust Co.*, 130 Ill., 268, and *Feitsam vs. Hay et at*, 122 Ill., 295.

THE DIRECTORS OF THE COMPANY DID NOT AUTHORIZE A MORTGAGE UPON THE FRANCHISE.

The resolutions of the board of directors authorizing the mortgage are set out in the mortgage.

The words of the granting and conveying part of the mortgage heretofore set out, to-wit: "all of its privileges, franchises, easements," are omitted from said resolutions.

All reference to the contract between the City of Omaha and Sidney E. Locke is also omitted from the resolutions.

As the resolution authorizing the making of the mortgage is set out in the mortgage there can be no presumption of any further authority.

OVER-ISSUE OF BONDS.

Capital stock of company $600,000. Prior issue of bonds $400,000.

Unlawful for company to become indebted beyond two-thirds of its capital stock.

Statute of Nebraska, Chap. 16, § 128.

The facts showing the over-issue appear from the face of the mortgage, and the articles of incorporation.

Morawetz on Corporations, §§ 591 and 592.

"It is a well settled rule that a person who deals with a corporation must at his own peril take notice of its charter or articles of incorporation. * * *

See also p. 44, of this brief.

The mortgage recites the fact of the prior issue of $400,000 bonds, p. 21. The first issue are still outstanding and have not been exchanged for new issue.

In *Commonwealth vs. Smith, et al*, 10 Allen, 458, the court said:

Illegality open to parties who received the bonds.

"The bonds issued by the Troy Greenfield Railroad Company * * * were issued to an amount very much in excess of the amount of capital stock actually paid in. Their illegality is apparent upon their face, and open equally to the knowledge of the party who issued and the party who received them."

First National Bank vs. D. Keefer Milling Company, 23 S. W. Rep., 675, is a case decided by the Court of Appeals of Kentucky, October 1, 1893, in which was presented this question.

The D. Keefer Milling Co. had a subscribed capital stock of $60,000. Its articles of incorporation provided that the company should not incur an indebtedness in excess of one-half of its stock. The First National Bank of Covington had advanced to the milling company, in all, $77,000, for which it had obtained judgments, and sought to have the same paid by the assignee of the milling company.

The court in a decree for distribution allowed to the bank only $30,000. On this point in the case the court said:

"It appears that there was in the articles incorporating the D. Keefer Milling Company a provision that the company should not in any event incur any liability or indebtedness in

the aggregate in excess of one-half its capital stock, *bona fide*, subscribed, which was $60,000. The articles of incorporation were, as required by statute, recorded, and, independent of presumed notice by Firit National Bank of Covington of the provision in regard to the limit of indebtedness the D. Keefer Milling Company was empowered to contract, it is a well settled rule that a person dealing with a corporation must at his peril take notice of its charter or articles of incorporations."

The same rule applied to over-issue of county and municipal bonds.

Nesbit vs. Riverside Independant District, 144 U. S., 610.

Sutliff vs. Lake Co. Com. 147 U. S., 230.

SO OVER-ISSSED STOCK IS ABSOLUTELY VOID.—"Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake or want of knowledge of the law, or is due to fraud and intentional wrongdoing. The animus or intent of the parties to the over-issue is not material. Over-issued stock, no matter how over-issued, represents nothing and is wholly and entirely valueless and void. So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality." Cook, § 292.

See also cases cited Note 2 to said § 292.

In *Scovill vs. Thayer* 185 U. S., 143, it was said:

"In this case the attempt to increase the stock of the company beyond the limit fixed by the charter was *ultra vires*. The increased stock itself was therefore *void*."

The same principle of law would declare an over-issue of bonds to be *ultra vires* and *void*. This is not a case where the bonds have passed into the hands of *bona fide* holders for value and without notice of this infirmity.

The exceptional cases are where the bonds were in hands of *bona fide* holders for value, and the amount was not beyond

the ratio of increased capital stock. *Water Company vs. DeKay*, 36 N. J. Eq. 548. Or where there was only an irregularity in the manner of so increasing the capital stock. *Farmers Loan & Trust Co. us. Toledo & C. Ry.*, 67 Fed. Rep., 58.

Error in refusing Thaddeus S. Clarkson leave to answer.

This refusal was make June 24, 1895, and before decree was entered. (p. 271.)

The memoranda of Judge Riner endorsed on the petition for appeal was made August 6, 1895, (p. 295) some forty days after the order of June 24th. The first order was made by Judge Dundy at a time when Judge Riner was not on the bench.

Illegalit
partie
c e i v
bonds.

It is true Jno. L. Webster, who on June 24th appeared as counsel for said Clarkson, did take part in the final argument of the case, but not as counsel for Clarkson, but as the solicitor for other defendants, whose case he had in charge from the commencement of the litigation.

It was important Clarkson should have leave to answer, for by his appointment he was instructed to make defense.

As against him the Trustee was required to prove the bonds had been sold to *bona fide* holders of value, without notice of infirmities.

See authorities cited *supra* p. 64.

See also *Burke vs. Guarantee Trust & Safe Deposit Co.*, 31 Atlantic Repr., 174. In this case it was ruled:

"Bonds issued by a railroad corportion in excess of the amonnt of case paid on its capital stock * * * are void in the hands of officers and directors of such corporation, or

others who have notice of the facts, and of persons who do not pay value therefor. * * *

"In proceedings to establish such bonds as a claim against the *receiver* of such corporation, the *burden is on the claimant* to show that he paid value for them without notice of their illegality."

The last above case was a bill filed by the Receiver of the *Philadelphia & Sea Shore Railroad Company vs. Guarantee Trust & Safe Deposit Company* to declare void the mortgage upon the property of the Company.

JNO. L. WEBSTER,

Solicitor for American Water Works Company (Ill.) American Water Works Company (N. J.); A. B. Hunt, Receiver of New Jersey Company, and Thaddeus S. Clarkson, Receiver of Illinois Company, Appellees.

994 & 995

Office Supreme Court U. S.
FILED
MAY 4 19
Y,

In the Supreme Court of the United States.

THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS; THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND ALONZO B. HUNT, TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY,

Petitioners for Certiorari.

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendants.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,

Petitioner for Certiorari,

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendant.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petition of The American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of Illinois; American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Alonzo B. Hunt, Temporary Receiver of the American Water Works Company of New Jersey, and Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

JNO. L. WEBSTER,

Attorney for Petitioner.

994 & 995

Office Supreme Court U. S.
FILED
MAY 4 1

In the Supreme Court of the United States.

THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS; THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND ALONZO B. HUNT, TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY,

Petitioners for Certiorari.

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendants.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,

Petitioner for Certiorari,

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendant.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petition of The American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of Illinois; American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Alonzo B. Hunt, Temporary Receiver of the American Water Works Company of New Jersey, and Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

JNO. L. WEBSTER,

Attorney for Petitioner.

In the Supreme Court of the United States.

THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF ILLINOIS; THE AMERICAN WATER WORKS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND ALONZO B. HUNT, TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY,

Petitioners for Certiorari.

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendants.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS,

Petitioner for Certiorari,

VS.

THE FARMERS LOAN & TRUST COMPANY,

Defendant.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petition of The American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of Illinois; American Water Works Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Alonzo B. Hunt, Temporary Receiver of the American Water Works Company of New Jersey, and Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Now come The American Water Works Company a corporation organized and existing under the laws of the State of Illinois, the American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, Alonzo B. Hunt, temporary receiver of the American Water Works Company of New Jersey, and Thaddeus S. Clarkson, Receiver of The American Water Works Company, a corporation of the State of Illinois, and jointly and severally apply for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit in a cause wherein the said American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, American Water Works Company, a corporation organized and existing under the laws of the state of New Jersey, and Alonzo B. Hunt temporary receiver of the American Water Works Company of New Jersey were appellants in that court and the Farmers Loan & Trust Company was appellee, and wherein Thaddeus S. Clarkson, receiver of the American Water Works Company, a corporation of the state of Illinois, was appellant and the Farmers Loan & Trust Company was appellee in said court, said cause having been appealed to said court from the United States Circuit Court for the District of Nebraska.

The petitioners apply for said writ for the following reasons:

1. That neither of said courts had jurisdiction to hear and determine this case for that the Farmers Loan & Trust Company, the original and sole plaintiff, was and is a citizen of the state of New York, and that neither of the defendants in the original bill were citizens of the State of Nebraska, the district within which said suit was brought, but that The American Water Works Company of Illinois was a corpora-

tion and citizen of the state of Illinois, and the American Water Works Company of New Jersey was a corporation of and a citizen of the state of New Jersey, and that Alonzo B. Hunt, although a citizen of the state of Nebraska, was only acting as temporary receiver of the property of the defendant companies within the district of Nebraska, and being an officer of the court was not a necessary party to the suit. (See plea to jurisdiction, page 66, record).

2. Because the original bill herein was one to foreclose a mortgage upon a water works plant built, constructed and maintained under and by virtue of a franchise granted by the city of Omaha, and that neither the laws of the state of Nebraska where said water works plant is located, nor the laws of the state of Illinois, the home of the mortgagor company, authorized the making of such mortgage upon the said water works plant, and that said mortgage was *ultra vires* and void.

3. That there is no provision in the statutes of the state of Illinois, the home of the mortgagor company, which authorized such company to execute a mortgage upon a water works plant constructed for the purpose of supplying a municipality with water for public and private purposes, neither is there any statutory law of the state of Nebraska authorizing a corporation to make and execute a mortgage upon a water works plant constructed for the purpose of supplying a municipality with water under the franchise granted by such municipality.

4. That neither the state of Nebraska nor the city of Omaha in any manner consented to, authorized or ratified the execution of said mortgage, or the issuance of said bonds purporting to be secured thereby.

5. That the American Water Works Company, the

mortgagor company, by reason of its construction, operating and maintaining a water works plant for the supplying of the city of Omaha with water for fire protection and public purposes, became and was a *quasi* public corporation, and as such did not have authority to issue bonds and secure the same by mortgage upon the water works plant without being authorized thereunto by the state or the municipality, and not being so authorized the said mortgage was *ultra vires* and void.

6. That the recitals in the bonds and in the mortgage made special reference to the fact that the property so mortgaged was a water works plant constructed and maintained for the purpose of supplying water to the city of Omaha for fire and public purposes, and by reason whereof the trustee and the holders of said bonds were put upon inquiry and had notice of the said want of authority to issue the bonds and to secure the same by the said mortgage.

7. That there is no proof in the record that any of the holders of said bonds were holders for value and without notice of the want of authority to issue the said bonds and to secure the same by mortgage upon the said water works plant.

8. That under the decree as rendered if enforced the said water works plant, together with the franchise granted by the city of Omaha, will be sold and the proprty thereby transferred to some third person or company with whom the city of Omaha would have no subsisting contract by which the city could compel the performance of public duty owing to the municipality by said mortgagor company.

9. That the directors of the mortgagor company while pretending to authorize the execution of a mortgage did not authorize the execution of a mortgage upon the franchise granted to it by the city of Omaha, yet nevertheless the decree

authorize a sale of the franchise as well as of the property necessary for the maintenance and operation of thes aid water works plant.

10. That the questions involved in this case are important in the following particulars to-wit: That the mortgage sought to be foreclosed was one to secure bonds to the amount of four million dollars ($4,000,000), and the question whether such a *quasi* public corporation could execute a mortgage or conditional sale of a water works plant constructed for the purpose of supplying a municipality with water for fire and public purposes under a franchise granted by said city, and where no statutory authority exists for the making of such mortgage, is a question which has never before in this country been judicially determined.

11. Because that even though the American Water Works Company of Illinois, the mortgagor Company, should be held to have authority under the laws of Illinois, to make and execute a mortgage upon such property in that state, nevertheless it would not have authority while not owning any property or transacting any business in its own state, to come into the state of Nebraska and assume the functions of a *quasi* public corporation and execute a mortgage upon the property in Nebraska when like corporations in the state of Nebraska were without authority to mortgage water works plants.

12. Because that the capital stock of the mortgagor company was limited to six hundred thousand dollars ($600,000) and the company was already indebted by reason of a prior mortgage in the sum of four hundred thousand dollars ($400,000), which was equal to two-thirds of its capital stock, and under the laws of Nebraska a corporation was forbidden to become indebted beyond two-thirds of its capital

stock, and by reason whereof the issue of the bonds under the mortgage sought to be foreclosed was illegal and void, and of which fact the bond-holders and the trustee had notice by reason of the recitals in the bonds and mortgage, and there was no proof in the record that any of the present holders of the bonds were *bona fide* holders for value without notice of the above infirmity.

13. Because Thaddeus S. Clarkson was appointed receiver of the American Water Works Company of Illinois, the mortgagor company, before the decision of the case in the Circuit Court, and made his application for leave to answer and make defense to the said foreclosure, and which right was denied him as such receiver.

A statement of facts in this case is set out at length on the first sixteen pages of the brief accompanying this petition and which are relied upon as a part hereof.

Wherefore, your petitioners pray the writ as above to review the case in this court, and that the Court fix the amount of supersedeas bond.

The American Water Works Company, a corporation organized and existing under the laws of the state of Illinois.

The American Water Works Company, a corporation organized and existing under the laws of the state of New Jersey, and Alonzo B. Hunt, temporary receiver of the American Water Works Company of New Jersey, and Thaddeus S. Clarkson, receiver of the American Water Works Company, a corporation of the state of Illinois.

JNO. L. WEBSTER
of Counsel.

By JNO. L. WEBSTER,
Their Attorney.

To R. S. HALL, JAMES M. WOOLWORTH AND DAVID MCCLURE, Solicitors for Farmers Loan and Trust Company:

Please take notice that on Monday, the 4th day of May,

1896, at the opening of court, the undersigned will present to the Supreme Court of the United States at Washington, a petition of which the foregoing is a true copy.

JNO. L. WEBSTER,
Attorney for Petitioner.

Copy received of John L. Webster, counsel for petitioners, this 24th day of April, 1896.

R. S. HALL,
Counsel for Complainant.
FARMERS LOAN AND TRUST COMPANY.
By R. S. HALL,
Its Solicitor.

994 & 995

TRANSCRIPT OF RECORD.

994 & 995

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 715.

THE AMERICAN WATER WORKS COMPANY (OF ILLINOIS) ET AL., APPELLANTS,

vs.

THE FARMERS LOAN AND TRUST COMPANY, APPELLEE.

No. 716.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS, APPELLANT,

vs.

THE FARMERS LOAN AND TRUST COMPANY, APPELLEE.

No. 717.

E. HYDE RUST, RECEIVER OF THE AMERICAN WATER WORKS COMPANY (OF NEW JERSEY) ET AL., APPELLANTS,

vs.

THE FARMERS LOAN AND TRUST COMPANY ET AL., APPELLEES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 30, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 715.

THE AMERICAN WATER WORKS COMPANY (OF ILLINOIS) ET AL., APPELLANTS,

vs.

THE FARMERS LOAN AND TRUST COMPANY, APPELLEE.

No. 716.

THADDEUS S. CLARKSON, RECEIVER OF THE AMERICAN WATER WORKS COMPANY, A CORPORATION OF THE STATE OF ILLINOIS, APPELLANT,

vs.

THE FARMERS LOAN AND TRUST COMPANY, APPELLEE.

No. 717.

E. HYDE RUST, RECEIVER OF THE AMERICAN WATER WORKS COMPANY (OF NEW JERSEY) ET AL., APPELLANTS,

vs.

THE FARMERS LOAN AND TRUST COMPANY ET AL., APPELLEES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 30, 1895.

INDEX.

	Original.	Print.
Caption to Transcript from U. S. Circuit Court		1
Bill of Complaint		1
Exhibit A (Mortgage American Water Works Co. to Farmers Loan & Trust Co., July 1, 1887)		20
Exhibit B (Mortgage American Water Works Co. to Farmers Loan & Trust Co., January 16, 1889)		45

	Original.	Print.
Order Appointing Receivers	72	56
Bond of Alonzo B. Hunt, Receiver	75	58
Bond of Ellis L. Bierbower, Receiver	76	59
Subpoena in Chancery and Marshal's Returns	77	60
Affidavit of C. H. Lamar for Order on Non-resident Defendants	80	62
Order on Absent Defendants	81	63
Motion of American Water Works Co., of New Jersey, to Quash Service of Summons	82	64
Affidavit of Alonzo B. Hunt	83	64
Copy of Subpoena in Chancery	83	65
Plea to the Jurisdiction	86	66
Order Overruling Plea to the Jurisdiction	88	68
Exception to Order Overruling Plea to the Jurisdiction	83	68
Answer of the American Water Works Company, of Illinois, and the American Water Works Company, of New Jersey	89	69
Proposal for Construction and Maintenance of Water Works in City of Omaha	92	72
Contract Between City of Omaha and Sidney E. Locke, July 20, 1880	93	73
Replication to Answer of American Water Works Co., of Illinois, and American Water Works Company, of New Jersey	106	83
Order Granting Leave to E. Hyde Rust, Suspended Receiver, to File Cross-bill	107	84
Cross-bill of E. Hyde Rust, Suspended Receiver of the American Water Works Company, of New Jersey	108	84
Demurrer of Farmers Loan & Trust Co., to Cross-bill of E. Hyde Rust	132	101
Entry of Appearance of E. Hyde Rust, Receiver of the American Water Works Company, of New Jersey, et al., and Motion for Leave to File Answer	134	103
Order Granting Time to Defendant A. B. Hunt to File Answer	142	108
Order of Submission of Motion of Certain Defendants for Leave to Answer	142	108
Answer of A. B. Hunt, Receiver	142	109
Proposal for the Construction and Maintenance of Water Works in the City of Omaha	146	111
Contract Between City of Omaha and Sidney E. Locke, July 20, 1880	148	113
Testimony for Defendants The American Water Works Company, of Illinois, and The American Water Works Company, of New Jersey	165	125
Exhibit 1 (Articles of Incorporation of the American Water Works Company, of Illinois)	165	125
Exhibit 2 (Report of J. D. Cook to the City Council of City of Omaha, May 20, 1880)	172	130
Exhibit 3 (Ordinance No. 423 of the City of Omaha)	196	149
Exhibit 4 (Ordinance No. 430, an Ordinance to Amend Sections 3, 6 and 12 of Ordinance No. 423)	204	156
Exhibit 5 (Contract Between City of Omaha and Sidney E. Locke, July 20, 1880)	208	159
Exhibit 6 (Ordinance No. 445, Permitting Location of Reservoirs Upon Reservoir Addition to the City of Omaha)	211	161
Exhibit 7 (Ordinance No. 469, an Ordinance to Amend Section 13 of Ordinance No. 423)	214	163
Exhibit 8 (Ordinance No. 618, Accepting the Water Works, etc.)	215	164
Testimony for Complainant	216	165

	Original.	Print.
William B. Cardoza	216	165
Statement of Deliveries of Bonds Certified by the Farmers Loan & Trust Company	219	167
Albert L. Bannister	221	168
Robert E. Boyd	224	171
List Showing Numbers and Amounts of Coupons Deposited with the Farmers Loan & Trust Company	226	172
Exhibit 6 (Plan and Agreement with Bondholders' Committee)	228	175
Testimony for Defendants American Water Works Co., of Illinois, and the American Water Works Company, of New Jersey	235	181
Exhibit 9 (Circular of Bondholders' Committee August 30, 1893)	235	181
Exhibit 10 (Circular of Bondholders' Committee, October 10, 1893)	236	182
Exhibit 11 (Circular of Bondholders' Committee, Nov. 1, 1893)	238	183
Clarence H. Venner	239	183
Exhibit 12 (Letter C. H. Venner to R. G. Rolston, Prest., November 1, 1893)	250	192
Exhibit 13 (Letter Turner, McClure & Rolston to C. H. Venner, November 2, 1893)	251	193
George L. Venner	265	203
Order Granting Leave to Amend Answers	267	204
Amendment to Answer of the American Water Works Co., of Illinois, and the American Water Works Company, of New Jersey	267	204
Replication to Answer of A. B. Hunt, Temporary Receiver	270	207
Replication to Amended Answer of American Water Works Co., of New Jersey, and American Water Works Co., of Illinois	272	208
Stipulation as to Certain Facts	273	209
Testimony for Defendants	275	211
Clarence H. Venner	276	211
Exhibit 1 (Letter W. A. Underwood to C. H. Venner, Nov. 27, 1886)	278	213
Exhibit 2 (Telegram W. A. U. to C. H. Venner, Nov. 29, 1886)	279	214
Exhibit 3 (Articles of Incorporation of the City Water Works Company, of Omaha)	282	216
Exhibit 4 (Order Suspending E. Hyde Rust as Receiver)	284	218
Testimony for Complainant	287	220
F. H. Marshall	288	220
A. B. Hunt	294	224
Exhibit H (Deed American Water Works Co., of Illinois, to the American Water Works Company, of New Jersey, April 24, 1891)	309	235
Exhibit I (Deed American Water Works Co., of Illinois, to the American Water Works Company, of New Jersey, April 24, 1891)	316	240
Exhibit K (Ordinance No. 29 of the City of South Omaha)	320	242
Exhibit L (Ordinance of the City of Florence, Passed August 13, 1889)	321	243
Exhibit M (Report of Committee of City Council of City of Omaha, January 10, 1888)	325	246
Exhibit N (Ordinance No. 445, Permitting Location of Reservoirs Upon Reservoir Addition)	325	247
Exhibit O (Certificate of Secretary of State of Nebraska, that Articles of Incorporation of American Water Works Company, of Illinois, and American Water Works Company, of New Jersey, Have Not Been Filed for Record)	328	249

	Original.	Print.
Order Overruling Motion of E. Hyde Rust, Receiver, et al., for Leave to File Answer, etc	329	250
Motion of Thaddeus S. Clarkson, Receiver for Leave to File Answer	330	251
Proposed Amended and Supplemental Answer of Thaddeus S. Clarkson, Receiver of the American Water Works Co., of Illinois	331	251
Order Denying Motion of Thaddeus S. Clarkson, Receiver, for Leave to File Answer	356	271
Decree of Sale	357	272
Stipulation that Certain Original Exhibits May be Omitted from Transcript	371	281
Assignment of Errors of the American Water Works Co., of Illinois, et al	372	282
Petition of American Water Works Company, of Illinois, et al., for Appeal	378	287
Order Allowing Appeal of American Water Works Co., of Illinois, et al	379	288
Assignment of Errors of Thaddeus S. Clarkson, Receiver	381	289
Petition of Thaddeus S. Clarkson, Receiver, for Appeal	386	293
Order Allowing Appeal of Thaddeus S. Clarkson, Receiver	388	295
Bond of American Water Works Company, of Illinois, et al., on Appeal	389	296
Citation on Appeal of American Water Works Company, of Illinois, and Admission of Service	391	297
Citation on Appeal of Thaddeus S. Clarkson, Receiver, and Admission of Service	392	298
Assignment of Errors of E. Hyde Rust, Receiver, et al	393	299
Petition of E. Hyde Rust, Receiver, et al., for Appeal	399	304
Order Allowing Appeal of E. Hyde Rust, Receiver, et al	401	305
Bond on Appeal of E. Hyde Rust, Receiver, et al	402	305
Citation on Appeal of E. Hyde Rust, Receiver, et al., and Admission of Service	403	306
Clerk's Certificate to Transcript	404	307
Appearance for Appellant in No. 715	309	309
Appearance for Appellant in No. 716	309	309
Appearance for Appellee in No. 715	310	309
Appearance for Appellee in No. 716	311	310
Order, Argument Commenced	311	311
Order of Submission	312	311
Opinion of Circuit Court of Appeals	314	312
Decree in No. 715	324	323
Decree in No. 716	325	325
Motion to Dismiss Appeal in No. 717	326	325
Decree Dismissing Appeal of E. Hyde Rust, Receiver, et al., in No. 717	327	326
Certificate of Clerk to Transcript	328	327

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term thereof, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, it being the second day of December, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

United States
Circuit Court of
Appeals, Eighth Circuit.

Be it remembered, that heretofore, to wit, on the thirtieth day of September A. D. 1895, a transcript of record was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to appeals allowed by the Circuit Court of the United States for the District of Nebraska, wherein the American Water Works Company of Illinois et al., were appellants and The Farmers Loan and Trust Company Appellee, and wherein Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois was Appellant and The Farmers Loan and Trust Company Appellee, and wherein E. Hyde Rust, Receiver of the American Water Works Company of New Jersey, et al., were Appellants and The Farmers Loan and Trust Company, et al., Appellees, which said transcript of record is in the following words, to wit:

1 Pleas, Before the Honorable John A. Riner, Judge of the District Court of the United States for the District of Wyoming, sitting in the Circuit Court of the United States for said District of Nebraska, within the Eighth Judicial Circuit, at the Term of May, A. D. 1895.

Be it Remembered, that on the 9th day of October, 1893, a Bill of Complaint was filed in the Clerk's Office of said Circuit Court, which said Bill of Complaint is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

The Holly Manufacturing Company, Appellant,

vs.

The Farmer's Loan and Trust Company, et al., Appellees.

To The Honorable The Judges of the Circuit Court of the United States for the District of Nebraska, sitting in equity.

The Farmer's Loan and Trust Company a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office and place of abode in the City of New York, brings this its Bill of Complaint, against The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, a citizen of the State of Illinois, and having its principal office and place of abode in the City of Chicago, in said State of Illinois, The American Water
2 Works Company, a corporation, organized and existing under the laws of the State of New Jersey, and a citizen of the State of New Jersey, and having its principal office and place of abode in the City of Jersey City, in said State of New Jersey, and E. Hyde Rust, as Suspended Receiver of the American Water Works Company, a citizen and resident of the State of New Jersey. And Alonzo B. Hunt, temporary Receiver of the American Water Works Company a citizen and resident of the State of Nebraska.

And thereupon your orator complains and says:

I. Your orator is a corporation, bearing the corporate name of the Farmer's Loan and Trust Company, duly created under

the laws of the State of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

II. The defendant The American Water Works Company, the Illinois corporation, (hereinafter called the Mortgagor Company,) is a corporation organized and existing under and by virtue of the laws of the State of Illinois, for the purpose of building, [equiping] and operating water works to supply water to cities, towns, villages, municipal and other corporations; and for acquiring by purchase, lease or otherwise, such works, and operating and dealing in the stock and bonds of other corporations and associations organized for a similar purpose, both in said State of Illinois and elsewhere, and for other purposes.

III. On or about the first day of July, 1887, the Mortgagor Company being thereunto by law duly authorized, to secure the payment of the bonds hereinafter mentioned, executed, acknowledged and delivered to your orator, the Farmer's Loan and Trust Company as Trustee, its certain mortgage or deed of trust, therein and thereby conveying and transferring to your orator, and to its successors or successor and assigns, all the following property and premises by the following description, to-wit:

3 "All its privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, which the American Water Works Company had on July 1, 1887, or may at any time thereafter during the existence of said mortgage acquire, in the County of Douglas, in the State of Nebraska, in and about its works, plant and property, used for the purpose of supplying the City of Omaha, its inhabitants and others in said County of Douglas with water for all purposes, whether or not the same be mentioned herein, among which are the following, that is to say, All and Singular, the following described property, situate, lying and being in the County of Douglas, in the State of Nebraska, known, described and designated as follows, to-wit:

"All those tracts or parcels of land situate in the City of Omaha, County of Douglas, State of Nebraska, known and described as follows:

"1st. Beginning at the intersection of Lowe Avenue and the north line of Nicholas Street, thence north two hundred and ninety-eight (298) feet, thence east six hundred and four feet (604), thence south two hundred and ninety-eight (298)

feet, to Nicholas Street, thence west six hundred and four (604) feet, to the place of beginning.

"2nd. Beginning at a point where the west line of Pleasant Street intersects the south line of Hamilton Street, thence westerly four hundred and thirty-three (433) feet, thence south seven hundred and four and eight-tenths (704 8-10) feet, to the North line of Nicholas Street, thence east four hundred and thirty-three (433) feet to Pleasant Street, thence North seven hundred and twenty-five (725) feet to the place of beginning.

3rd. Beginning at the intersection of the east line of Lowe Avenue with the south line of Hamilton Street thence easterly on the South line of Hamilton Street six hundred and four (604) feet, thence south four hundred and six and eight-
4 tenths (406 8-10) feet, thence west parallel with the half section line of six hundred and four (604) feet to the east line of Lowe Avenue, thence north on the east line of Lowe Avenue four hundred and three tenths (400 3-10) feet to the place of beginning.

"4th. Lots one (1), two (2), three (3), four (4), Five (5), six (6) seven (7) and eight (8), in block Q of the City of Omaha according to the recorded plat thereof.

5th. Lots one (1), two (2), five (5), and six (6), in block three hundred and twenty-eight (328) in the City of Omaha, according to the recorded plat thereof.

"And also all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents from the said City of Omaha, under and by virtue of a contract made between the said City of Omaha and one Sidney E. Locke and afterwards assigned by the said Locke to the said City Water Works Company of Omaha and by the said first named corporation assigned to the American Water Works Company; and under and by virtue of any contract now existing or which may hereafter exist between the said City of Omaha and the American Water Works Company or its assigns, or which enures to the benefit of the said The American Water Works Company and its assigns by assignment or otherwise, and all water rents from private consumers wheresoever situate and all other income of any kind whatsoever from any property or person in said County of Douglas, in the State of Nebraska."

IV. In and by virtue of said mortgage or deed of trust it was provided that said instrument should work and should be an absolute assignment of said debts, dues, demands, choses in action and water rentals, both those existing on July, 1, 1887,

or which might at any time thereafter exist, or be derived in said County of Douglas, and of the property of the said The American Water Works Company in the said County of Douglas, to your orator as Trustee, to the extent, and for the uses and purposes in said instrument mentioned.

5 V. Your orator further shows that thereafter, and on or about the 16th day of January, 1889, the said Mortgagor Company, in accordance with a provision contained in said mortgage or deed of trust, being thereunto by law duly authorized, duly made, executed and delivered to your orator a further and supplemental mortgage or deed of trust, to secure the payment of the said bonds hereinafter mentioned, therein and thereby conveying and transferring to your orator, and to its successor or successors and assigns all the following property and premises by the following description, to-wit:

"All the privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, in the said County of Douglas, and State of Nebraska, which were conveyed by said mortgage or deed of trust, and also all the privileges, franchises easements, choses in action, estate, property real and personal, effects and assets, which the said The American Water Works Company has acquired since the making of said mortgage or deed of trust in the said County of Douglas, and State of Nebraska, or which it now has in said County of Douglas and State of Nebraska, whether or not the same be mentioned herein, among which are the following, that is to say: All and Singular the following described property situate, lying and being in the City of Florence, County of Douglas, and State of Nebraska, known, described and designated as follows: Beginning at a point eighty-five (85), feet south of the northwest corner of Block one hundred and twenty-seven, (126), of the City of Florence as surveyed, platted and recorded, and running south.
Seven hundred and ninety-five (795), to the right of way of the St. Paul, Minneapolis & Omaha Railroad, thence in a southerly and easterly direction along such right of way (a three [decree] curve) to a point one thousand eight hundred and sixty-seven (1867) feet (end of curve); thence south two hundred and sixty-three (263) feet thence east one hundred and five (105) feet; thence south two thousand three hundred and sixty-five (2365) feet to the right of way of the aforesaid St. Paul, Minneapolis and Omaha Railroad; thence in a southeasterly direction along said right of way seventy (70)
6 feet thence east nine hundred and thirty-five (935) feet to the southwest corner of Block number two hundred and sixty-three of the City of Florence, as surveyed, platted

and recorded; thence north one thousand three hundred (1300) feet; thence east six hundred and sixty (660) feet; thence north one hundred and ninety-five (195) feet (more or less) to the west bank of the Missouri River; thence in a northeasterly and northerly direction along the bank of said river until intersecting with the east and west line through the northwest corner of block number one hundred and twenty-seven (127) said line being the same as the North line of said Block and the south line of Bridge Street of the City of Florence as surveyed, platted and recorded; thence west five hundred and ninty-five (595) feet (more or less), and thence in a southwesterly direction one hundred and seventy-five (175) feet to the point of beginning, containing one hundred and twenty-five (125) acres of land (more or less).

"Also Lots one (1), two (2), four (4), five (5), and eight (8) Block No. 2, and whole of block number two hundred and sixty (260), all of the City of Florence, as surveyed, platted and recorded.

"And also all the water works, mains, pipes, machinery, standpipe, chattels real, real estate, effects, choses in action, and assets of the said The American Water Works Company in the City of South Omaha, in said County of Douglas, and State of Nebraska, including all water rentals, debts, dues and demands, and choses in action of every kind and nature both water rentals from the said City of South Omaha, in and by virtue of the contract by and between the said city of South Omaha, and the said The American Water works Company, and in and by virtue of a contract existing January 16, 1889, or which might thereafter exist between the said City of South Omaha, and the American Water Works Company or its assigns, which enures or might enure to the benefit of the said The American Water Works Company and its assigns, and all water rents from private consumers wheresoever situate, and all other income of whatsoever kind from any property of said
Company or source whatsoever, in said County of Doug-
7 las, and State of Nebraska."

VI. It was provided in said supplemental mortgage that said instrument should further work and be an absolute assignment of said debts, dues, demands, choses in action, and water rentals, both those existing January 16, 1889, or which might at any time thereafter exist or be derived in said County of Douglas, and of the property of the said The American Water Works Company in the said County of Douglas, to your orator, as Trustee, to and for the uses and purposes in said instrument mentioned.

VII. The said mortgage and supplemental mortgage were made by said defendant, the Mortgagor Company, to secure

an issue of bonds which the said defendant, the Mortgagor Company, being thereunto by law duly authorized, did, on or about the first day of July, 1887, execute and issue, dated that day, and for the sums respectively of one thousand dollars, aggregating the sum of Four Millions of Dollars of principal, payable on the first day of July, 1907, and bearing interest at the rate of six per cent per annum, payable semi-annually on the first days of January and July in each and every year at the office of your orator in the City of New York, said interest payments being further evidenced by the coupons attached to said bonds. Upon each of said bonds there was a certificate made by your orator stating that said bond was one of a series amounting to Four Millions of Dollars issued in accordance with the trust mortgage referred to in the said bond, and was entitled to the benefit thereof; said mortgage being the mortgage hereinbefore mentioned and described; all of which by the said bonds and each of them, and the said certificates thereon, to which your orator, for greater certainty, refers, will more fully and at large appear.

VIII. In and by said mortgage of July 1, 1887, it was provided that the right was reserved to the Mortgagor Company at any time on or before the issue and delivery by your orator of any of said bonds, numbered from two thousand and one to four thousand, both, inclusive, to reduce the rate of in-
8 terest thereon to five per cent. per annum, payable semi-annually, and in that case the said Mortgagor Company should certify under its seal and the signature of its President and Secretary to [you] orator its determination to reduce the rate of interest on any of said bonds, and your orator should thereupon cause to be endorsed or stamped upon the face of each of said bonds upon which it had been determined to reduce the rate of interest the words, "Interest upon this bond reduced to and fixed at five per cent, per annum before issue," and upon the face of each coupon the words "Reduced to Twenty-five Dollars." In each of said bonds the said Mortgagor Company reserved the right, when the said Two Millions of Dollars of bonds were issued, to reduce the rate of interest thereon, or any part thereof, to five per cent per annum. And thereafter the said Mortgagor Company duly determined to reduce the rate of interest on the bonds secured by said mortgage, and numbered consecutively from two thousand and one to four thousand, both inclusive, to five per cent, per annum, and thereafter said determination was duly certified to your orator, and there was caused to be endorsed and stamped upon the face of each of said two thousand bonds, numbered from two thousand and one to four thousand, both inclusive, the words, "Interest upon this bond reduced to and fixed at five

per cent per annum before issue," and upon the face of each coupon the words "Reduced to Twenty-five Dollars.

IX. In and by said supplemental mortgage of January 16, 1889, the said Mortgagor Company further promised and agreed that said instrument was given for the purpose of securing the payment, according to the provisions in the said mortgage or deed of trust contained, of the principal and interest of all the four thousand bonds therein mentioned as the same severally and respectively thereafter became due and according to the rate at which the same should thereafter bear interest, in gold coin of the United States of the present standard of fineness.

X. Said mortgage or deed of trust and said supple-
9 mental mortgage surveyed the property, premises, franchises and rights hereinbefore described to your orator, to have and to hold the said rights privileges, easements, choses in action, property real and personal, estate effects and assets, in trust for the purpose of securing the payment.

(A). Of the interest on such of said bonds as should be at any time during the lien of said mortgages outstanding or negotiated;

(B). The principal of such of said four thousand bonds as should be outstanding and negotiated at any time during the continuance of said mortgages, according to the provisions and agreements contained in said coupons and bonds respectively, *pro rata* and without preference or priority between different bonds, (It being understood that the lien of said mortgages was to secure the payment of all interest on any of said bonds in full prior to the payment of any principal,) the payments to be made said bond holders by said Trustee or by any receiver or officer acting as Master in Chancery or in case of foreclosure, however the money should come to said Trustee, Master [of] Receiver, should be made *pro rata*, first to pay said interest, and second said principal, without preference or priority between bonds, and each of said bonds which might be at any time outstanding and negotiated should be deemed to be equally secured by said mortgages and all conveyances or mortgages supplementary thereto.

XI. In and by said mortgage or deed of trust it was provided that should the said Mortgagor Company at any time make any default in the payment of the interest on said bonds, or any instalment or part of any instalment thereof, at the time, in the manner, or at the place when and where said interest, or any instalment or part thereof, should be due and payable according to the terms of said bonds and coupons, or

should said mortgagor Company make any default, or neglect, or refuse, or in any manner fail to observe, do, keep, and perform, all and singular, each and every covenant, promise, agreement and stipulation in said bonds and coupons, and
10 said mortgage contained, and by it, said Mortgagor Company, to be observed, done, kept and performed, then your orator might at its option, in case such default, neglect, refusal or failure, should extend for the period [on] ninety days, declare the whole sum, [principzl] and accrued interest evidenced by said bonds and coupons then outstanding and negotiated, to be then immediately due and payable and in default.

XII. In and by said mortgage or deed of trust it was further provided, that in case of any default in the payment of the principal sum evidenced by said bonds according to the provisions and agreements of said bonds and coupons, and in case of any default, neglect, refusal or failure to observe, keep and perform, all and singular each and every covenant, agreement, provision and stipulation in said bonds and coupons and said mortgage contained, and by said Mortgagor Company to be observed, kept and performed, all the rights of said Mortgagor Company to retain in its possession all said mortgaged rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, should immediately cease and therefrom the right of possession of the same should immediately vest in [in] your orator, and your orator might at once enter into possession thereof, and the said Mortgagor Company, and each and every occupant to be moved and put out, and may have, receive, sue for, collect and receipt for in its own name, or that of the Mortgagor Company, or any assignee of said Mortgagor Company, all and singular the water rentals, and prices due and to become due from the City of Omaha, or from private consumers, or others on account of water supplied for fire, domestic or other purposes, and all and singular the income of the Mortgagor Company from whatever source derived, receive and have all debts, dues, and demands of whatever nature or kind, receive receipt for, have and appropriate to the purposes of the trust created by said instrument, and might during said time, as to it might seem fit and best, with or without foreclosing said mortgage, continue in possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estates,
11 property real and personal, effects and assets, and operate and carry on the works and business of said Mortgagor Company, and carry out and perform the contracts of the Mortgagor Company with its customers for the supply of water, including the City of Omaha, and make new contracts for the

supplying of water, and by means of the works, machinery, mains, pipes and valves of the Mortgagor Company [suppy] water and do all and singular the acts and things which the said Mortgagor Company could [so] in the premises if it had remained in the possession of the same.

XIII. In and by said mortgage or deed of trust it was further provided, that in case of any default as aforesaid in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof which should continue for ninety days, or in case of any default, neglect, refusal or failure to observe, do, keep and perform all and singular the covenants, conditions, promises, agreements, and stipulations, in said bonds and coupons or in said mortgage contained, it should and might be lawful for your orator to foreclose said mortgage and forever bar the Mortgagor Company of all equity of redemption therein, and in case of such foreclosure, or any proceeding therefor, your orator might at the commencement of the suit and before any plea, answer or demurrer was filed, apply for the appointment of a receiver of all the rents and profits debts, dues, demands and choses in action, and the property, estate and assets of the Mortgagor Company thereby mortgaged or conveyed, or intended so to be, or which it then should then possess or be entitled to, or interested in, and such receiver should be appointed without any opposition [form] the Mortgagor Company, and such Receiver should be vested with all the rights, and privileges, and subject to all the duties and obligations granted to and obligatory upon your orator in case of entry into possession and [and] as specified in the preceding paragraph of this Bill of Complaint; and in case of any foreclosure of said mortgage the whole sum of the indebtedness evidenced by said bonds and coupons, both principal and interest, should be deemed to be due and payable, and such foreclosure should be to satisfy such whole sum.

12

XIV. In and by said mortgage or deed of trust it was further provided, that in no event should any expense of any kind fall upon your orator, but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith in the administration of the trusts in said mortgage contained, should be paid by the said Mortgagor Company; and in case of any entry and taking possession by your orator, or in case of any foreclosure proceedings or in case of the appointment of any receiver, or in case of the receipt of any moneys by your orator or any receiver or officer of court from any income, debts, dues or demands collected or received by it, him or them from any sale of the goods,

or any of them, therein mortgaged or conveyed, or intended so to be, or thereafter conveyed by any assignment, conveyance or supplementary mortgage the costs and expenses of all kinds of the said Trustee in the administration of the trust, of foreclosure and sale, or courts, officers, and receivers, should be first paid out of said moneys and the surplus, if any, should be devoted to paying the whole indebtedness secured thereby, interest and principal pursuant to the terms of the first above clause until the whole thereof is paid, and if there should remain any surplus the same should be paid over to the Mortgagor Company. It is further provided that the Trustee should be entitled to be reimbursed all proper outlays of every sort, or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any duties that it might at any time perform in the discharge of the same, and all such fees, commissions, compensations and disbursements should constitute a lien on the mortgaged property and premises.

XV. In and by said mortgage or deed of trust it is further provided that no delay or omission of your orator, or of the holders of the bonds secured thereby, in respect to any
13 default happening or continuing as aforesaid, to exercise the rights and powers arising therefrom as in said mortgage provided, should be held to exhaust or impair such rights and powers, or be construed to be a waiver of said defaults.

XVI. In and by said mortgage or deed of trust it was further provided, that on any sale, whether by your orator or the Court, of the property thereby conveyed, or any part thereof, your orator should have the right to buy in the same, and a majority in amount of the holders of the outstanding bonds should have the right, by a written instrument under the hands and seals of such majority, to fix a sum which it shall be the duty of your orator to bid for the property so sold on behalf of and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of your orator, or a Court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of said mortgage, and of the proportion of said sum payable to the bondholders not concurring in such request. On any purchase your orator should hold the property so purchased upon trust for the equal benefit of the bondholders who had required your orator to buy in the property in their behalf as the absolute property of said bondholders, without any right of redemption or resale in favor of said Mortgagor Company or any bondholder.

XVII. In and by said mortgage or deed of trust said Mortgagor Company covenanted, granted, bargained and agreed

to and with your orator that it would be at any time in the future, upon demand, at its own expense, execute, deliver and record all such further and other conveyances, assignments and supplementary mortgages of the rights privileges, easements, estate, choses in action, property real and personal, effects and assets then owned by it, whether covered by said conveyance or not situate in the said County of Douglas in the [St4te] of Nebraska, and of any right, privilege, easement, chose in action, property real and personal effects and
14 assets, which it might at any time thereafter acquire in said County of Douglas and State of Nebraska, and in any wise connected with the said mortgage property as your orator might demand to subject the same to the lien of said mortgage and such further and other conveyances, assignments [amd] supplementary mortgages should be deemed a part of this instrument, and form together one security for the payment of the debt evidenced by said bonds and coupons; and in accordance with said covenant the said Mortgagor Company executed and delivered the supplementary mortgage of January 16, 1889, hereinbefore mentioned, and in and by said supplementary mortgage provided that said supplementary mortgages, together with said original mortgage or deed of trust should be deemed one instrument and that all provisions in said mortgage or deed of trust contained for the possession by the Mortgagor Company previous to any default for defeasance, and all the conditions, agreements, and covenants in said mortgage contained, were recited and made part of said supplementary mortgage, and all the provisions in said mortgage or deed of trust contained for the protection of your orator and the limitation of its liabilities were made a part of said supplementary mortgage as if therein again specially written. And the said Mortgagor Company in said supplementary mortgages further covenanted to make such further and other conveyances, assignments and supplementary mortgages as it had already [covented] in said original mortgage or deed of trust.

XVIII. The said mortgage of July, 1, 1887, and the said supplementary mortgage of January 16, 1889, were and are the proper acts and deed of the Mortgagor Company, by it authorized, made and delivered in all respects in conformity with law: and the first mentioned mortgage was duly recorded in the office of the County Clerk of Douglas County, on the 18th day of July, 1887, in Book 67 of Mortgages, page 598, and the second mentioned mortgage was duly recorded in the office of the Register of Deeds for the County of Doug-
15 las, on the 27th day of March, 1889, in Book 115 of Mortgages, Page 75, and the same are valid conveyances

for the purposes therein stated. The trusts therein and thereby created were duly accepted by your orator before the recording of the said mortgages or deeds of trust respectively as aforesaid. Your orator attaches to this its Bill of Complaint, as Exhibits "A" and "B" copies of said mortgages, and referring thereto, prays that the same may be taken as part hereof.

XIX. The said Mortgagor Company duly made, executed and delivered to your orator the entire issue of Four thousand bonds under said mortgage or deed of trust, and under and by virtue of the provisions of said mortgage or deed of trust your orator, being thereunto duly requested, certified in the form set forth therein, and delivered upon the orders of said Mortgagor Company, three thousand six hundred of the bonds mentioned and described in the said mortgage or deed of trust and to secure which the same was executed and delivered as aforesaid, and a large number of said bonds aggregating a very large sum of money are outstanding and existing obligations on the part of the Mortgagor Company, and the remaining four hundred bonds, numbered from sixteen hundred and one to two thousand, both inclusive, are deposited with your orator under the provisions of said mortgage for the purpose of exchanging, redeeming or purchasing four hundred thousand dollars of bonds issued by the City Water Works Company of Omaha, which are secured by a mortgage covering a portion of the premises hereinbefore described. The holders and owners of a large number of said bonds, and of a large number of the unpaid coupons, secured by said mortgages have requested, in writing, your orator to commence this suit to foreclose the said mortgages or deeds of trust. The holders of the bonds secured by the said mortgages or deeds of trust are numerous and the names and residence of many of such holders are unknown to your orator, and your orator cannot allege with greater certainty the
16 number of bonds outstanding constituting valid claims against the defendant the Mortgagor Company, or the amount of the indebtedness existing by virtue of the same.

XX. Default was made by the Mortgagor Company, in the payment on the first day of [Janusry], 1892, of the Coupon interest due on that day on all the said bonds which were issued and outstanding as aforesaid, and all the interest on all of said bonds due on that day remains over due and unpaid, except that since said default thirty-five of the six per cent coupons and one hundred and twenty-nine of the five per cent coupons, due on said first day of January, 1892, have been paid. Default was also made by the Mortgagor Company in

the payment on the first day of July, 1892, of the coupon interest due on that day on all the said bonds, except eight hundred and eighty-five of the six per cent coupons and nine hundred and thirty-eight of the five per cent, coupons, due on that day, have been paid. And default has also been made by the Mortgagor Company in the payment on the first day of January, 1893, of the coupon interest due on that day on all of said bonds, except that twelve hundred and thirty-four of the six per cent Coupons and fifteen hundred and thirty-six of the five per cent coupons were paid. All the remaining interest due on said several days on the said bonds remains overdue and unpaid. And default has also been made by the Mortgagor Company in the payment on the first day of July, 1893, of the coupon interest due on that day on all of the said bonds. Demand has also been duly made of the Mortgagor Company for the payment of some of the said interest on some of the said bonds which fell due on each of the dates aforesaid, and payment of the same has been refused. The default in non-payment of the coupon interest due on the first days of January and July 1892, and the coupon interest due on the first day of January, 1893, has extended for more than ninety days, and your orator now declares the whole sum of the principal and accrued interest evidenced by said bonds and coupons now outstanding and unpaid to be immediately
17 due and payable and in default.

XXa. Your orator further shows that after the execution and delivery of said mortgages or deeds of trust to your orator the said Mortgagor Company on or about the 26th day of April, 1891, made, executed and delivered to the defendant, The American Water Works Company, The New Jersey corporation, a deed whereby it purported to convey to said New Jersey corporation all its works, property, franchises, easements, choses in action, of every kind, character and nature whatsoever, and that said New Jersey corporation at present claims to be the owner of the said property and premises described in said mortgages or deeds of trust, but your orator is advised and therefore alleges, that the rights of the said New Jersey corporation in and to said property and premises are in all respects inferior to and subject to the lien of the mortgages made to your orator as aforesaid.

XXb. Your orator further shows that in a suit brought in the Circuit Court of the United States for the District of Nebraska, by the Denver City Water Works Company and others, complainants, against the American Water Company, (the New Jersey corporation) and others, defendants, on the 11th day of February, 1892, an order dated that day was duly made

appointing Ellis L. Bierbauer and Alonzo B. Hunt Receivers of all the property and assets, real and personal of every kind and description of the said The American Water Works Company, the New Jersey corporation which might be situated in the District of Nebraska including the property premises and franchises covered by the said mortgages to your orator, and said Receivers thereupon entered into possession of the property of which they were so appointed receivers. And thereafter, and in or about the month of July, 1892, in a suit brought in the Court of Chancery a court of competent jurisdiction in the State of New Jersey, by certain creditors of the American Water works Company, The New Jersey corporation, to have the same declared insolvent and for a distribution of its funds among the creditors, under the statute, in which action the
18 Denver City Water works Company and others were complainants and The American Water Works Company (The New Jersey corporation) and others were defendants, the defendant E. Hyde Rust, was appointed by the said Court of Chancery receiver of all the property and franchises of the said New Jersey corporation; and thereafter the said Rust was, by order of the Circuit Court of the United States for the District of Nebraska, duly substituted in the place and stead of said Bierbauer and Hunt as receiver in the action brought in said Circuit Court of the United States, and said defendant Rust as such receiver is now in possession of the property, premises, and franchises covered by the said mortgages made to your orator as aforesaid; but your orator alleges that whatever rights the said Rust as such receiver may have are inferior to and subject to the lien of the said mortgages made to your orator;

XXc. Your orator further shows that under the law of the State of New Jersey concerning corporations approved April, 7, 1875, and as subsequently amended, the Chancellor of said State, in an action brought by any creditor or stockholder setting forth the facts and circumstances of the case showing that a corporation is insolvent, has power to proceed in a summary way to hear the affidavits, proofs and allegations which may be offered by or on behalf of the parties, and if upon such inquiry into the matters or causes of the Complaint it shall be made to appear to the Chancellor that the said Company has become insolvent and shall not be about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it shall and may be lawful for the Chancellor to issue an injunction to restrain the said Company and its officers and agents from exercising any of the privileges or franchises granted by its certificate, or by the act incorporating the said company, and from collecting and re-

ceiving any debts, or from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands,
19 tenements, or effects of the said Company until the Court shall otherwise order; and it shall and may be lawful for the Court of Chancery, if the circumstances of the case and the end of justice require it at the time of ordering the said injunction to appoint a receiver or receivers with full power and authority to demand, sue for, collect, receive, and take into their possession all the goods, chattels, rights and credits, moneys and effects lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said company at the time of their insolvency or suspension of business, and to sell, convey or assign, all the said real or personal estate, and with the other powers in said statute enumerated, and it has been held by the Courts of said State of New Jersey, and your orator alleges that it is the law of said State, that upon such appointment of a receiver its title to its property is divested by force of law and becomes vested in the receiver.

XXd. Your orator further shows that the said suit of the Denver City Water Works Company and others, brought in the Court of Chancery, State of New Jersey, and hereinbefore referred to, was brought under said statute of the State of New Jersey, and that by the order entered in such action and dated the 20th day of July, 1892, the said E. Hyde Rust was by said Court of Chancery appointed receiver of the said The American Water Works Company (The New Jersey corporation), with full power to demand, sue for, collect and receive and take possession of the goods and chattels, rights and credits moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said The American Water Works Company, and to perform all the duties imposed upon him and required by law, and especially by said act entitled "An act concerning Corporations," approved April 7, 1875, and the acts supplemental thereto and amendatory thereof; and said order also contained an injunction restraining the said Company,
20 and its officers and agents, from exercising any of the privileges or franchises granted by its certificate, and from collecting or receiving any of the debts, and from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the said Company, and your orator is advised, and therefore alleges that by virtue of said order the said The American Water Works Company was divested of its title to all its property, both real, personal and mixed, and that the said title became vested in the said receiver so appointed.

XXe. Your orator further shows that before the filing of this bill by orders of the Court of Chancery of the State of New Jersey, and of the Circuit Court of the United States for the District of Nebraska, duly made, and entered, your orator was authorized to make the said E. Hyde Rust, as receiver, a defendant in this its suit to foreclose said mortgages.

Your orator further avers that on the .....day of ....., 1893, the said E. Hyde Rust was by the consideration of the Circuit Court of the United States for the District of Nebraska suspended as Receiver of said American Water Works Company and the said Alonzo B. Hunt was by the consideration of said Court duly appointed temporary Receiver of said American Water Works Company. And your orator avers and says that by reason of such order and proceedings the said Alonzo B. Hunt is a proper and necessary party to this suit, being thereby invested with the duties and powers of a receiver for said Company and with the title of said property and control of the same.

And your orator further shows to this Court that upon due [aplication] made to his Honor Elmer S. Dundy, Judge, an order was duly made by the consideration of the said Circuit Court of the United States for the District of Nebraska before the filing of this Bill authorizing your orator to sue the said Alonzo B. Hunt, Receiver.

21 XXI. Your Orator is informed and believes that the Mortgagor Company is insolvent, and wholly unable to pay its debts and obligations, and that the property and premises covered by the said mortgages or deeds of trust so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, namely the holders of the bonds secured by the said mortgages or deeds of trust so made to your orator as aforesaid.

XXII. By reason of the matters and things hereinbefore alleged that there is due to your orator, as trustee under the aforesaid mortgages or deeds of trust, the amount of the principal sum secured by each and every of the said bonds that have been issued, together with the coupon interest which fell due on the first day of January 1892, and on the first day of July, 1892, and on the first day of January 1893, and on the first day of July 1893, and which remains unpaid as aforesaid, with interest on each instalment of the said coupon interest from the time when the same fell due as aforesaid.

No proceedings have been had, at law or in equity, for the collection of said mortgage debt or any part thereof, save only this suit.

XXIII. In consequence of the embarrassed conditions of the financial affairs of the Mortgagor Company, an- on account of many of the difficulties which are manifest upon and from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under the said mortgages or deeds of trust, to execute its said trust in the way and manner specified and provided in and by the said mortgages or deeds of trust, without the aid or interposition of this Honorable Court in Chancery sitting:—nor can the said trust be executed as your
22 orator is advised and charges, and the rights of all the parties interested be ascertained and fully protected in the premises otherwise than by a judicial sale of the mortgaged premises, and of all the franchises property, premises, and appurtenances covered by the said mortgages or deeds of trust. Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises, and property of the Mortgagor Company, of whatever name, nature and description including all its money on hand, and the earnings of the same, be placed in the hands and under the control of a receiver, to be appointed herein, by this Court, with such proper powers and control over the same as to the Court shall seem right and equitable to be conferred. In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived,) according to the best of their knowledge information and belief to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated; that your orator be placed in possession of the mortgaged premises personally, or that a receiver may be appointed in this cause of all and singular the rights, franchises, and property, of every name and nature of the said defendants, The American Water Works Company

(of Illinois), and of The American Water Works Company (of New Jersey), covered by the lien of said mortgages, with power and authority to operate said Water works and other
23 property, and carry on the business of said Mortgagor Company under the protection of this Court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to said Mortgagor Company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever; that an injunction may issue out of this Court, resfraining and enjoining the said Mortgagor Company and all and every its agents and servants, from in any way interfering with the possession or control of the property of said Mortgagor Company under the control of said receiver, and from selling, transferring, conveying, leasing or otherwise disposing of or incumbering any of the property, rights or franchises of said Mortgagor Company; that all the rights and franchises, and all the property real and personal, of the said Mortgagor Company, may be declared subject to the lien of the said mortgage or deed of trust; that an account may be taken of the amounts due upon the bonds secured by the said mortgage or deed of trust and now outstanding, with interest thereon; that the amount so found due may be found to be the first lien on the property of the said Mortgagor Company, according to the terms of the said mortgage or deed of trust; that the said Mortgagor Company may be decreed to pay the amount so found to be due upon said bonds and the coupons thereto, for interest or principal or both; that in default thereof, all the property and franchises of the said Mortgagor Company may be sold under a decree of this Court and according to the law and practice of this Court, to satisfy the amount so found due; that out of the proceeds of said sale, or the net per cent earnings while in the hands of said receiver so to be appointed, there may be paid, first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the Court, and that the residue thereof may be applied to the payment of the
24 amount due upon the said mortgage bonds and the coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this Court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the said Mortgagor Company; and that your orator may have such other and further

relief in the premises as the circumstances of the case may require and as may be agreeable to equity.

May it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court directed to the defendants The American Water Works Company, (Of Illinois), The American Water Works Company of New Jersey), and E. Hyde Rust as Receiver, of the American Water Works Company, (of New Jersey), to appear and answer this bill,

And your orator will ever pray etc.,

THE FARMERS' LOAN AND TRUST COMPANY,
By, R. G. ROLSTON, President.

[Seal]

Attest:—

E. S. MARSTON, Secretary.
TURNER, McCLURE, & ROLSTON.
C. H. LAMAR,
Solicitors for complainant.
HERBERT B. TURNER,
of Counsel.

State of New York,
Southern District of New York—ss.

I, Rosewell G. Rolston, being duly sworn, depose and say that I am the President of The Farmers' Loan and Trust Company, the complainant above named, and have been such
25 President for a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true. That this verification is not made by the complainant, because it is a corporation; and that my knowledge is derived from having taken part in the transactions spoken of and from statements made to me, and from examination of the papers, and the same constitute my grounds of belief. The seal affixed to said Bill of Complaint is the corporate seal of said complainant, and was so affixed by its authority.

Sworn to before me this 1st day of September, 1893.
[Seal]

R. G. ROLSTON.

W. B. CARDOZO,
Notary Public, No. 145.
New York, County.

EXHIBIT "A."

This Indenture, made and entered into this first day of July, A. D. 1887, by and between The American Water Works Company, a corporation, organized under the laws of [of] the State of Illinois and having its principal office at the City of Chicago, party of the first part and Farmers' Loan and Trust Company, of the City, County and State of New York, a corporation, organized under the laws of the State of New York, having its principal office at the City of New York, as trustee, party of the second part:

Witnesseth, that Whereas The American Water Works Company, is a corporation organized under the laws of the State of Illinois, having its principal office and place of business in the City of Chicago, Cook County, in the State of Illinois;

And Whereas, The said The American Water Works Company is authorized to build, equip and operate works to supply water to cities, towns, villages and municipal and other
26 corporations, to acquire by purchase, lease or otherwise such works, and operate and deal in the stock the bonds of other corporations and associations organized for a similar purpose, both in the said State of Illinois, and elsewhere.

And Whereas, the said The American Water Works Company has purchased of and from the City Water Works Company, of Omaha, Nebraska, a corporation organized under the laws of the State of Nebraska, its water works, including the real estate connected and used with the same by means of which, the said City of Omaha, and its inhabitants are supplied with water for fire and other purposes, including the contract under which the said City Water Works Company *of* Omaha, furnishes and supplies water to said City of Omaha, and all contracts with private consumers, which said property is more fully hereinafter described.

And Whereas, the said The American Water Works Company has agreed to assume the bonded debt of the said City Water Works Company, and pay the same and to assume and pay all the other indebtedness of the said City Water Works Company, as a part of the consideration to be paid to the said City Water Works Company by said The American Water Works Company, and in addition thereto, a large sum of money in cash.

And Whereas, The said City Water Works Company had determined previous to said purchase to make certain large and extensive improvements, additions and enlargements of its work and plant, for the purpose of enabling it to comply with

the increased demand upon it arising from the rapid growth of the City of Omaha, and has commenced the same; which improvements, additions and enlargements the said The American Water Works Company deems also essential and necessary to the successful maintenance and operation of said water works and to comply with the contract with the said City of Omaha.

And Whereas, The said American Water Works Company is authorized by law to contract debts and borrow money without limit:

27 And Whereas, the power of contracting debts and of borrowing money by the said The American Water Works Company, is vested in the Board of Directors hereof, and the said Board of Directors is authorized, so as aforesaid, to borrow money and contract debts in its name, and make, issue and deliver its obligations therefor and secure the same by mortgage on its property, and pledge its income and resources for the payment thereof, and as security therefor;

And Whereas, heretofore, on the thirtieth day of June, 1887, the board of directors of said The American Water Works Company, at a meeting duly held at the office of the Company in the City of Chicago, Illinois, unanimously adopted the following resolutions:—

Whereas, this Company has purchased from the City Water Works Company of Omaha, Nebraska, a corporation, organized under the laws of the State of Nebraska, all its plant and property and all its interest under the contract between said company and the City of Omaha, by which the said City of Omaha as a municipality, is supplied with water.

And Whereas, such purchase was made subject to four hundred thousand dollars ($400,000) of six per cent bonds secured by a mortgage of the property of said City Water Works Company, which said bonds and said mortgage bear date on the second day of August, 1880, and are due and payable on the second day of August, 1905, with the option to pay the same on the second day of August, 1900;

And Whereas, said purchase was also made subject to the payment of the outstanding debts, dues and demands owing by said City Water Works Company of Omaha, which amount to the sum of one hundred and sixty thousand dollars, ($160,000);

And Whereas, this company is indebted for the purchase price of said property of the said City Water Works Company

in a large sum of money in addition to the assumption of said debts.

And Whereas, in order to comply with the requirements of the contract with the said City of Omaha and to provide suitable means and facilities of furnishing water to said
28 City of Omaha, and its inhabitants, of suitable quality and in suitable quantities it is necessary to expend in the purchase of land and in building and erecting a new plant and in building new and additional pumping machinery of large capacity; in laying new mains throughout the City; in reinforcing the present system of mains by additional ones of larger size and connecting the system of mains in the City with the new plant by a double line of thirty-six (36) inch pipe for a distance of about six miles; the building of settling basins; the finishing and completion of the separate high service system and other extensions and improvements to the said plant, a large sum of money estimated at not less than eight hundred thousand dollars ($800,000), all which erections, additions, extensions, enlargements and improvements must be completed within the next eighteen months.

And Whereas, for the purpose of securing the payment of said bonded debt and the payment of the said other debts of said City Water Works Company, assumed by this Company, and the payment to the said City Water Works Company of the said purchase price of said property and the payment for the making of such improvements, additions, extensions and enlargements so determined upon will require the sum of $2,500,000.

And Whereas, and in view of the rapid growth of the said City of Omaha, both past and [propective], this Company deems it necessary to provide means sufficient in amount to make further extensions, enlargements, improvements and additions of its work as the same became necessary, without resorting to a new issue of bonds.

And Whereas, for the purpose of such further enlargements, extensions and improvements the directors of this company have determined that one million, five hundred thousand dollars ($1,500,000) more of bonds in addition to the Two million five hundred thousand dollars ($2,500,000) aforesaid should be provided for, to be issued under proper restrictions, for
29 the purpose of making such enlargements, improvements and extensions as may be necessary in the future;

And Whereas, it may be impossible at the present time to take up and pay off and redeem all said bonds so issued by said City Water Works Company.

Therefore Resolved, that this company make, issue and deliver its four million dollars ($4,000,000) of negotiable bonds, being four thousand (4,000) bonds of one thousand (1,000) each numbered consecutively from number one (1), to number four thousand (4,000) both inclusive, bearing date July 1st. 1887, to become due and payable July 1st, 1917, with interest at six per cent per annum payable semi-annually according to forty coupons to be annexed to each of said bonds.

Resolved, that said bonds shall be in such form and of such tenor and effect as to the President and Secretary of this Company shall seem best; provided, the same shall be in accordance with the terms of these resolutions but may contain such other covenants agreements, conditions and stipulations as are not in contravention of any thing in these resolutions expressly contained.

Resolved, That The Farmers' Loan and Trust Company of New York be appointed trustee under all the trusts in connection with the said bonds and the mortgage securing the same.

Resolved, That four hundred (400) of said bonds of one thousand dollars ($1000) each numbered from number sixteen hundred and one (1601) to number two thousand (2000) both inclusive, be deposited with the Farmers' Loan and Trust Company of New York, as Trustee, for the purpose of retiring the said four hundred thousand dollars ($400,000) bonds so as aforesaid, made and delivered by the said City Water Works Company, and shall be held in trust by said trustee and only issued in exchange for or for the purpose of retiring the aforesaid bonds of said City Water Works Company, on such terms and in such manner as may be stated in the mortgage executed under the authority of these resolutions.

Resolved, that five hundred (500) of said bonds by these resolutions authorized, being bonds numbered from number two thousand and one (2001) to number two thousand five hundred (2500) both inclusive, be deposited with the said The Farmers' Loan and Trust Company, as trustee, for the purpose of future sale on account of the making of such improvements, extensions, enlargements and additions now determined upon and that the same shall be delivered by the said The Farmers' Loan and Trust Company to the order of the President and Secretary of this Company at any time after January 1st, 1888, upon substantially the following terms and conditions, viz:—If it shall be made to appear to the said trustee by a sworn certificate of the President and Treasurer of this Company that the net income of this company from its

Omaha property is sufficient to pay interest at six per cent per annum on two million five hundred thousand ($2,500,000) dollars, the said trustee will deliver said five hundred (500) bonds in lots [nor] [exceedinng] one hundred (100) bonds in any one month upon the order of the President and Secretary of this Company under the seal thereof.

Resolved, that fifteen hundred (1500) of said bonds by these resolutions authorized being bonds numbered from two thousand five hundred and one (2501) to number four thousand (4000,) both inclusive be deposited with the said The Farmers. Loan and Trust Company as trustees, for the purpose of future sale for the making of enlargements, extensions improvements and renewals in the future as aforesaid, but none of the same shall be delivered or issued or suffered to be outstanding previous and prior to the first day of July, A. D. 1888, and then only in substantially the following manner:—When the board of directors of this Company shall have determined to make any improvements enlargements, extensions or renewals, of its works and plant, at or near Omaha, and shall after said first day of July, 1888, have expended in cash the [the] sum
31 of at least fifty thousand dollars ($50,000) therefor, and shall present to the said trustee a statement of such improvements, extensions, additions, or renewals, together with an itemized statement of the cost thereof, verified by the oath of the President and Secretary of this Company, it shall be the duty of said trustee to deliver to the order of said President and Secretary so many of said Fifteen hundred (1500) bonds then remaining in trust with said trustees, as shall be sufficient at par to pay the said disbursements so made on account of such improvements, enlargements, extensions, or renewals, but not exceeding one hundred thousand dollars ($100,000) of said bonds in any one month provided that said trustee shall require of this Company a statement of the actual income, expenses and taxes during the six months next preceding any application for such bonds, verified by oath of its President and Treasurer and if it shall appear from said statement that the actual income of the Company at the rate of income for said six months over and above operating expenses, taxes and interest on the bonds authorized by these resolutions then already outstanding is sufficient to pay the interest on the additional bonds applied for, it shall be the duty of said [truatee] to issue and deliver the same to the order of the President and Secretary of this Company under the seal thereof.

Resolved, The said Trustee shall as often as a semi-annual payment of interest become due, cut off and cancel the coupons attached to all of said bonds so remaining in trust with it, so

that none of the said bonds shall be issued with any past due coupons thereon.

Resolved, That this company shall reserve in the bonds and the mortgage securing the same, the right at or before the issuing any of said bonds numbered from number two thousand and one (2001) to number four thousand (4000), both inclusive, to reduce the rate of interest thereon to five per cent, per annum, payable semi-annually, and in case such reduction
32 of interest on any of said bonds, shall be desired, this Company shall certify under its seal and the signatures of its Presidents and Secretary to the said trustee, its determination to reduce the rate of interest on any of its bonds last aforesaid, and said trustee shall cause to be indorsed or stamped on each of said bonds upon which it has been determined to reduce the rate of interest, a statement of the fact in such words as may be fixed and determined upon and set forth in the mortgage securing said bonds.

Resolved, That to secure the payment of said four thousand (4000) bonds or so many of them as shall at any time be outstanding without preference or priority, interest and principal, this Company make, execute and deliver to the Farmer's Loan and Trust Company of the City of New York, the said Trustee above named, a mortgage of all its works, plant, property real and personal, mains, pipes, choses in action and assets of every kind and description, situate in the county of Douglas, State of Nebraska, and all rents, dues and demands from the City of Omaha and from private consumers at Omaha and elsewhere in said County of Douglas, in such form and with such covenants, agreements, conditions and stipulations and provisions as to said President and Secretary of this Company shall seem best, provided, however, that nothing in said mortgage contained shall be in contravention of anything in these resolutions expressly contained but otherwise at the discretion of said President and Secretary, and when the said bonds and the said mortgage shall be executed by the President and Secretary in the name of its Company under its seal they shall be the bonds and mortgage of this Company and such execution thereof shall be evidence in all courts and places of the approval by this Company of the terms of said bonds and mortgage and of their due execution by this corporation;

And Whereas, the said The American Water Works Company in pursuance of said resolutions has made, executed and delivered its four thousand negotiable bonds of the sum

33 of one thousand dollars each of the form, tenor and [affect] following, that is to say:—

United States of America,

OMAHA WATER WORKS.

Six Per Cent.
First Consolidated Mortgage Bonds.
Issued by
The American Water Works Company.

No..... $1000.

On the first day of July, 1907, for value received the American Water Works Company, a corporation, organized under the laws of Illinois, promises to pay to bearer, One Thousand Dollars with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, on presentation and surrender of the coupons hereto annexed as they respectively become due, both principal and interest payable in lawful money of the United States at the office of the Farmers' Loan and Trust Company in the City of New York, N. Y.

This bond is one of a series of four thousand of like tenor and effect, amounting to the sum of Four Million Dollars, First Consolidated Mortgage Bonds, authorized to be issued by The American Water Works Company, two thousand of which, numbered from number two thousand and one to number four thousand, both [inxclusive], amounting to Two Million Dollars, are placed in trust with said The Farmers' Loan and Trust Company for future extensions, improvements, and enlargements of the Water Works at Omaha, Nebraska, all of which bonds are secured by a duly authorized, executed, and recorded deed of trust, bearing even date herewith, conveying the property real and personal of said corporation, located in the County of Douglas, and State of Nebraska, in and about the City of Omaha, including its income from the Water Works by which the City of Omaha, and the inhabitants thereof are supplied with water, and the franchise therefor, to the
34 said The Farmers' Loan and Trust Company in the City of New York, Trustee.

The American Water Works Company reserves the right when the said Two Million Dollars of Bonds so placed in trust

are issued to reduce the rate of interest thereon or any part thereof to Five per cent per annum.

In Witness Whereof, the said The American Water Works Company hath caused this negotiable bond to be executed by its President and Secretary, who each covenant that they are duly authorized in this behalf, and its corporate seal to be hereto affixed, this first day of July, A. D. 1887.

President.

Secretary.

To each of which said bonds forty coupons are attached of the form, tenor and effect following, that is to say:—

Coupon.

$30.00 OMAHA WATERWORKS. $30.00
January 1st 1888.

The American Water Works Company will pay the bearer Thirty Dollars at the office of the Farmers' Loan and Trust Company, New York, City, for six months interest due on First Consolidated Mortgage Bond No.

Secretary.

And upon each of said bonds previous to the delivery thereof, a certificate shall be indorsed by the said The Farmers' Loan and Trust Company of the form, tenor and effect following, that is to say:—

Trustees' Certificate.

This bond is one of a series amounting to $4,000,000 issued in accordance with the trust mortgage referred to within and is entitled to the benefit thereof.

THE FARMERS' LOAN AND TRUST COMPANY.

By .....

President.

35 All of which said four thousand bonds have been delivered to the said The Farmers' Loan and Trust Company subject to the following terms:

1st. Bonds consecutively numbered from number one (1), to number sixteen hundred (1600), both inclusive, shall be delivered by the said The Farmers' Loan and Trust Company on demand to any person or persons presenting to it a written order signed by the President and Secretary of the first party,

under the seal of the first party and upon the delivery thereof said trustees shall indorse on such bonds herein mentioned as shall be so delivered, the trustees' certificate aforesaid.

2nd. Bonds numbered consecutively from number sixteen hundred and one (1601), to number two thousand (2000) both inclusive shall be retained by the said The Farmers' Loan and Trust Company in trust for the purpose of retiring the four hundred (400) bond- heretofore made and delivered by the said City Water Works Company of Omaha, as mentioned aforesaid, under the provisions and subject to the conditions hereinafter specified.

The said The Farmers' Loan and Trust Company shall at any time upon the written request of the President and Secretary of the first party, sell any and all of said four hundred (400) bonds mentioned in this second clause, provided the same can be sold for not less than par in cash, and the proceeds keep and retain for the purpose of retiring, paying and discharging the said bonds so issued by the said City Water Works Company of Omaha, and shall at any time during the continuance of this trust, on demand and presentation at its office in the City of New York, exchange any and all of the said bonds mentioned in this second clause, par for par, for an equal number of the bonds so issued by said City Water Works Company of Omaha, and upon selling or exchanging the said bonds so secondly mentioned as deposited with it shall indorse thereon the trustees' certificate [aforesaod].

36 3rd. Bonds numbered consecutively from number two thousand and [—] (2001) to number two thousand five hundred (2500) both inclusive, shall be retained by the said The Farmers' Loan and Trust Company, as trustee, and shall be delivered by the said The Farmers' Loan and Trust Company to the order of the President and Secretary of the first party at any time after January 1st. A. D. 1888, upon the following terms and conditions, viz:—

Whenever it shall be made to appear to the said second party by a sworn certificate of the President and Treasurer of the first party that the net income of the first party from its Omaha property is sufficient to pay interest at six per cent, per annum on two million five hundred thousand dollars, ($2,500,000) the said trustee shall deliver the said five hundred bonds (500) in lots not exceeding. one hundred bonds (100) in any one month upon the order of the President and Secretary of the first party under the seal thereof.

4th. Bonds numbered consecutively from number two thousand five hundred and one (2501) to number four thousand

both inclusive, shall be retained by the said The Farmers' Loan and Trust Company for the purpose of future sale for the making of enlargements, extensions, improvements and renewals of said water works and plant, but none of the same shall be delivered or issued or suffered to be outstanding previous and prior to the first day of July, 1881, and then only on the terms and conditions following, that is to say:—

Whenever the Board of Directors of the said The American Water Works Company shall have determined to make any improvements, enlargements or extensions to the works and plant of said Company at or near Omaha, after July 1st. 1888, and shall have after said last mentioned date expended in cash at least the sum of fifty thousand dollars ($50,000) therefor, and shall present to the said trustee a statement
37 of such improvements, extensions and renewals, together with an itemized statement of the cost thereof, certified by the oath of the President and Secretary of said Company, it shall be the duty of said trustee to deliver to the order of said President and Secretary so many of said fifteen hundred (1500) bonds then remaining in trust with it under the terms of this clause as shall be sufficient par to pay the said disbursements so made on account of said improvements, enlargements, extensions or renewals, but not exceeding one hundred thousand ($100,000) of the bonds mentioned in this clause shall be delivered in any one month.

Provided, However, that said second party before delivering any of said bonds last mentioned shall require of the first party a statement of the actual income, expenses and taxes, of said first party during the six months next preceding any application for any of said last-mentioned bonds, to be verified by the oath of the President and Secretary of the first party. And unless it shall appear from the said statement that the annual income of the Company at the rate of income for the said six months over and above operating expenses, taxes and interest, on bonds secured by this mortgage then already outstanding, is sufficient to pay the interest on the bonds applied for no [binds] shall be then issued, but if the net income aforesaid shall be sufficient to pay such interest, it shall be the duty of the said second party, as such trustee, forthwith to issue and deliver so many of said last mentioned bonds as shall be sufficient for the purpose aforesaid to the order of the President and Secretary of the first party.

5th. While any of the said four thousand (4000) bonds shall so remain in the custody of the said trustee the same shall not be considered to be outstanding or negotiated, but upon the delivery by the said trustee and the indorsement of said trus-

tees' certificate thereon, they shall be deemed to be outstanding and negotiated to be paid with pro rata equality with all other bonds of said four thousand (4000) which shall be
38 outstanding and negotiated and entitled to an equal pro rata benefit of all the provisions of this instrument.

The said The Farmers' Loan and Trust Company, shall as often as any installment of interest becomes due on such bonds, cut off, deface and cancel the coupons as they respectively become due upon all of said bonds remaining in its custody under the provisions of this instrument and the said coupons so cut off, defaced and cancelled, return to the party of the first part and take its receipt therefor.

6th. Whenever any of said bonds so placed in trust, as aforesaid, with the said The Farmers' Loan and Trust Company shall be issued and delivered by said trustees, the said trustee shall stamp or indorse upon each bond so delivered by it the trustees' certificate aforesaid.

7th. The right is reserved to the party of the first part at any time at or before the issue and delivery by said trustee on any of said bonds numbered from number two thousand and one (2001) to number four thousand (4000), both inclusive, to reduce the rate of interest thereon to five per cent. per annum, payable semi-annually, and in that case the said first party shall certify under its seal and the signatures of its President and Secretary to the said trustee its determination to reduce the rate of interest on any of its bonds last aforesaid, and the said trustee shall thereupon cause to be indorsed or stamped upon the face of each of said bonds upon which it has been determined to reduce the rate of interest, the words, "Interest upon this bond reduced to and fixed at five per cent, per annum before issue," and upon the face of each coupon the words "Reduced to twenty-five dollars."
39 in the State of Nebraska, in and about its works, plant and property, used for the purpose of supplying the City of Omaha, its inhabitants and others in said County of Douglas with water for all purposes, whether or not the same be mentioned herein among which are the following, that is to say, All and Singular, the following described property, situate, lying and being in the County of Douglas, in the State of Nebraska, known, described and designated as follows, to-wit:—

All those tracts or parcels of land situate in the City of Omaha, County of Douglas, State of Nebraska, known and described as follows:—

1st. Beginning at the intersection of Lowe Avenue and the north line of Nicholas Street, thence north two hundred and

ninety-eight (298) feet, thence East six hundred and four feet (604), thence south two hundred and ninety-eight (298) feet, to Nicholas Street, thence west six hundred and four (604) feet, to the place of beginning.

2nd. Beginning at a point where the west line of Pleasant Street intersects the south line of Hamilton Street, thence westerly four hundred and thirty-three (433) feet, thence south seven hundred and four and eight-tenths (704 8-10) feet, to the North line of Nicholas Street, thence East four hundred and thirty-three (433) feet to Pleasant Street, thence north seven hundred and twenty-five (725) feet to the place of beginning.

3rd. Beginning at the intersection of the east line of Lowe Avenue with the south line of Hamilton Street, thence easterly on the South line of Hamilton Street six hundred and four (604) feet, thence south four hundred and six and eight-tenths (406 8-10) feet, thence west parallel with the half section line six hundred and four (604) feet to the East line of Lowe Avenue, thence north on the east line of Lowe Avenue four hundred and three tenths (400 3-10) feet to the place of beginning.

4th. Lots One (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), in Block Q of the City of Omaha, [accord-] to the recorded plat thereof.

40 5th. Lots one (1), two (2), five (5), and six (6), in Block three hundred and twenty-eight (328) in the City of Omaha, according to the recorded plat thereof.

And also all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents from the said City of Omaha under and by virtue of a contract made between the said City of Omaha and one Sidney E. Loche and afterwards assigned by the said Loche to the said City Water Works Company of Omaha and by the said first named corporation to the first party; and under and by virtue of any contract now existing or which may hereafter exist between the City of Omaha and the party of the first part or its assigns, or which enures to the benefit of the said first party and its assigns by assignment or otherwise, and all water rents from private consumers wheresoever situate and all other income of any kind whatsoever from any property or person in said County of Douglas, in the State of Nebraska.

And the said party of the first part hereby makes, constitutes and appoints the party of the second part its successors and assigns, as true and lawful attorney, in fact, in its name, and in its place and stead, to have, receive, sue for, demand, collect, and receipt for all said debts, dues, demands, choses in

action, and water rents hereby conveyed for the purposes of the trusts in this mortgage expressed.

And this instrument shall further work and be an absolute assignment of said debts, dues, demands, choses in action, and water rentals, both those now existing or which may at any time hereafter exist, or be derived in said County of Douglas, and of the property of the said The American Water Works Company, in the said County of Douglas, to the said second part, as said trustee, to the extent and for the uses and purposes expressed hereinafter.

41 To Have And To Hold the said rights, privileges, easements, choses in action, property real and personal, estate, effects and assets above conveyed, to the said party of the second part, as trustee its successors and assigns, in trust nevertheless and subject to the following stipulations, covenants and agreements, as trustee, that is to say:

1st. This mortgage is given for the purpose of securing the payment:—

(A) Of the interest on such of said bonds as shall be at any time, during the continuance of the lien of this mortgage, outstanding or negotiated.

(B) The principal of such of said four thousand bonds, heretofore described, as shall be outstanding and negotiated at any time during the continuance of this mortgage, according to the provisions and agreements contained in said coupons and bonds respectively, pro rata, and without preference or priority between different bonds, (it being understood that the lien of this mortgage is to secure the payment of all interest on any of said bonds in full, prior to the payment of any principal, the payments to be made said bondholders by said trustee or by any receiver or officer acting as master in Chancery, or in case of foreclosure, however the moneys shall come to the said trustee, master or receiver, shall be made pro rata, first, to pay said interest, and second, said principal without preference or priority between bonds, and each of said bonds which may be at any time outstanding and negotiated shall be deemed to be equally secured by this mortgage and all conveyance or mortgages supplementary hereto.

2nd. So long as the first part shall observe, do, keep, and perform, all and singular, the promises, agreements, covenants and stipulations, in said bonds and coupons, and in this mortgage contained, and shall well and truly pay, or cause to be paid, the interest, and principal of the debt evidenced and promised to be paid by said bonds, and coupons, [if] the time,

in the manner, and at the place therein mentioned for
42 the payment thereof it, the said first party, may retain possession of all the mortgaged rights, franchises, privileges, easements, estate, choses in action, property real and personal, effects and assets, without let or hindrance from the second party.

3rd. In case the said first party shall pay the interest on said bonds as the same becomes due and payable, at the time, in the manner, and at the place the same is payable, according to the terms of said bonds and coupons, and shall well and truly pay the principal of said bonds at the time, in the manner, and at the place for the payment thereof, according to the terms of said bonds, and shall upon demand pay all the expenses of administering the trust, and shall, during the continuance of the lien of this mortgage, observe, do, keep, and perform all the covenants, agreements, and stipulations herein contained, and all the things to be by it observed, done, kept, and performed, according to the terms of the said bonds and coupons and this mortgage, then the said party of the second part shall cause this mortgage to be released and discharged, (but at the expense of the first party,) and all the mortgaged rights, privileges, franchises, easements, choses in action, property estate, effects and assets shall be released from the operation of the same.

4th. But should the said party at any time make any default in the payment of the interest on said bonds or any installment, or part of any installment, thereof, at the time, in the manner or at the place when and where said interest or any installment or part thereof, shall be due and payable according to the terms of said bonds and coupons, or should the said first party make any default or neglect or refuse or in any manner fail to observe, do, keep, and perform all and singular, each and every covenant, promise, agreement, and stipulation in said bonds and coupons and this mortgage contained and by it to be observed done, kept, and performed, then the said second party may, at its option, in case such default, neglect, refusal or failure shall extend for the period of ninety days, de-
43 clare the whole sum principal and accrued interest evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default.

5th. In case of any default in the payment of the principal sum evidenced by said bonds according to the provisions and agreements therein contained, or any default in the payment of interest according to the provisions and agreements, of said

bonds and coupons, and in case of any default, neglect, refusal or failure to observe, keep and perform, all and singular, each and every covenant, agreement, provision and stipulation in said bonds and coupons and this mortgage contained and by said first party to be observed, kept and performed; all the righ-s of the first party to retain any possession of the mortgaged rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, shall immediately cease, and therefrom the right of possession of the same shall immediately vest in said second party, and the said second party at once enter into possession thereof and the said first party and each and every occupant remove and put out, and may have, receive, sue for, collect and receipt for in its own name or that of the first party or any assigns of the first party, all and singular, the water rentals and prices due and to become due from the City of Omaha, or from private consumers or others on account of water supplied for fire, domestic or other purposes, and all and singular the income of the first party, from whatever source, derived, receive, and have all debts, dues and demands, of whatever nature or kind receive, receipt for, have and appropriate to the purposes of the trusts created by this instrument; and may during said time as to it may seem fit and best, with or without foreclosing this mortgage, continue in the possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, and operate and carry on the works and business of the first
44 party and carry out and perform the contracts of the first party with its customers for the supplying of water, including the City of Omaha, and make new contracts for the supplying of water and by means of the works, machinery, mains, pipes, and valves of the first party supply water and do, all and singular, the acts and things which the said first party could do in the premises, if it had remained in the possession of the same.

6th. And in case of any default as aforesaid, in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof, which shall continue for ninety days, or in case of any default, neglect, refusal or failure to observe, do, keep, and perform, all and singular, the covenants, conditions, promises, agreements and stipulations, in said bonds and coupons or in this mortgage contained, it shall and may be lawful for the said second party to foreclose this mortgage and forever bar the first party of all equity of redemption therein, and in case of such foreclosure or proceedings therefor, the said second party may, at the commencement of suit and before any plea, answer or demurrer is filed, apply for the appointment of a receiver and all the rents and profits,

debts, dues, demands, and choses in action, and the property estate and assets of the first party hereby mortgaged or conveyed or intended so to be, or which it shall then possess or be entitled to or interested in, and such receiver shall be appointed without any opposition from the first party, and such receiver shall be vested with all the rights and privileges and subject to all the duties and obligations granted to and obligatory upon the second party in case of entry into possession, and as specified in the fifth sub-division of this mortgage; and in case of any foreclosure of this mortgage, the whole sum of the indebtedness evidenced by said bonds and coupons, both principal and interest, shall be deemed to be due and payable and such foreclosure shall be to satisfy such whole sum.

45 7th. In no event shall any expense of any kind [a] fall upon said trustee; but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith in the administration of the trusts herein contained, shall be paid by the first party.

8th. In case of an entry and taking possession by the second party, or in case of any foreclosure proceedings, or in case of any appointment of any receiver, or in case of the receipts of any moneys by the second party, or any receiver or officer of Court from any income, debts, dues or demands, collected or received by it, him, or them from any sale of the things or any of them herein mortgaged or conveyed or intended so to be, or hereafter conveyed by any assignment, conveyance or supplementary mortgage, the costs and expenses of all kinds of the said trustee in the administration of the trust, of foreclosure and sale, of courts, officers and receivers, shall be first paid out of said moneys, and the surplus, if any, shall be devoted to paying the whole of the indebtedness secured hereby, interest and principal, pursuant to the terms of the first above clause, until the whole thereof is paid; and if there should remain any surplus, the same shall be paid over to the first party.

9th. It is stipulated and agreed that said second party will safely keep said four hundred (400) bonds numbered consecutively from sixteen hundred and one (1601) to number two thousand (2,000) both inclusive, to be deposited with it as aforesaid, and will not issue or deliver the same, or suffer the same to become outstanding, except for the uses and purposes of exchanging, redeeming and purchasing the said four hundred thousand dollars ($400,000) of bonds so as aforesaid issued by said City Water Works Company of Omaha; and that second party will hold, use, and dispose of the same for said purposes and will deliver the same in exchange as aforesaid, according

to the terms of the provisions hereinbefore in this mort-
46 gage contained in reference to the trusts upon which the said four hundred (400) bonds are so deposited with the said second party.

And the said second party hereby stipulates and agrees that it will safely keep the five hundred bonds, numbered consecutively from number two thousand and one (2001) to number two thousand five hundred (2,500) both inclusive, to be deposited with it according to the resolutions hereinbefore set forth and the tenor of this instrument and will not issue or deliver the same, or suffer the same to become outstanding, until after the first day of January, A. D. 1888; but that after the first day of January, A. D. 1888, it will issue and deliver the same upon the order of the President and Secretary of the first party under the seal of said first party.

And the said second party hereby stipulates and agrees that it will safely keep the fifteen hundred (1500) bonds, numbered consecutively from number two thousand five hundred (2,500) to number four thousand (4,000) both inclusive, to be deposited with it according to the resolutions hereinbefore set forth and the terms of this instrument, and will not issue or deliver the same, or suffer the same to become outstanding, except for the uses and purposes expressed in this mortgage, and will hold, use and dispose of the same for such purposes according to the terms and provisions in this instrument contained but will at any time after July first, A. D. 1888, deliver so many of the same under the circumstances and upon the conditions and with the limitations hereinbefore in this mortgage expressed, and in said resolutions contained, as shall be necessary at par to provide means for the making of improvements, extensions, enlargements, additions and renewals, as aforesaid.

It is stipulated and agreed that the certificate of the President and Secretary under the seal of the first party shall be sufficient evidence of the action of the first party in ordering the issue and delivery of any of the bonds secured by this mort-
gage, and such certificate shall be conclusive evidence of
47 the necessity for the enlargements, additions, improvements, and renewals, or either of the same, to procure the issue of said fifteen hundred (1500) bonds last mentioned and placed in trust.

10th. The party of the second part, as trustee or otherwise, shall be under no obligation to recognize any person or persons, firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or to refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation professing or claiming to

be such holder or owner, until such supposed holder or holders shall produce the said bonds and deposit the same with the trustee, and shall indemnify and save harmless the trustee to its full satisfaction, from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

11th. The right of action under this Indenture is vested exclusively in the trustee, and under no circumstances shall any bond holder or any number of bondholders have any right to institute an action or other proceeding on or under this Indenture, for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provision of this Indenture shall be instituted and conducted by the trustee according to its sound discretion; but the trustee shall be under no obligation to institute any such suit or to take any proceedings under this Indenture until it shall be indemnified to its full satisfaction for all the expenses and costs of every kind, and also for all possible claims for damages.

12th. Should any suit or other proceeding be brought against the trustee by reason of any matter or thing connected with the trusts hereby created, or by reason of its being
48 such trustee, it shall be under no obligation to enter any appearance by counsel, or in any way appear in and defend the said suit or other proceeding, until indemnified to its satisfaction for so doing but it may never the less appear and defend the same without indemnity, if it shall elect to do so, and in such case it shall be compensated therefor from the trust fund.

13th. In case at any time it shall be necessary or proper for the trustee to make any investigation respecting any facts preparatory to taking or [nor] taking any action, or doing or not doing anything as such trustee, the certificate of the party of the first part, under its corporate seal, attested by the signature of its President and the affidavit of one or more directors, shall be sufficient evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

14th. It shall be no part of the duty of the party of the second part to see to the recording of this Indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage, or renewing such mortgage, or to do any other act which it may be suitable and proper to be done for the continuing of the lien of this Indenture, or for giving notice

of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance.

15. The trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable, in any case, for the act or default of any agent or attorney or employee selected with reasonable discretion; nor shall it be responsible for the issue and delivery to the order of said first party of any of said fifteen hundred (1500) bonds so as last aforesaid placed in trust within the limits in this instrument contained.

49 16th. The trustee shall be entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations, and disbursements shall constitute a lien on the mortgaged property and premises.

17th. It is further stipulated and agreed that in case the said trustee shall desire, for any reason, to surrender the trust conferred upon it by this instrument, it may at any time do so, and may nominate its successor, and if the person so nominated is a fit and proper person, the said first party shall, by resolution of the Board of directors confirm the said nomination, and certify the same to the second party; and in such case the said second party may transfer the trust, by deed properly executed to the successor so chosen, or the second party may in its discretion in the first instance, or in case the parties fail to agree, and with or without the consent of the first party, apply to any Court then having equity jurisdiction in the County in which the mortgaged property, or any part thereof, shall then be situated, either a court of the United States or of the State of Nebraska, for the appointment of such successor, and such Court may appoint a successor to the second party; and it is agreed and stipulated that the successor so appointed, whether by act of the parties or by a Court, upon accepting the same shall succeed to all the interest, rights, and privileges, and be subject to all the duties and obligations. pertaining to the second party hereto, and to all intents and purposes become and be the second party to this instrument and any subsequent or supplementary assignment, conveyance, or mortgage the same as if originally named therein.

18th. And it is further stipulated and agreed that during the continuance of this mortgage and the said first party will

not commit or suffer to be committed, any waste of its
50 property or assets, that it will not release any contract it now has for the supplying of a water to the City of Omaha, or any person or persons, whereby the income of the first party shall in any way be diminished, either annually or in gross, without the consent of the second party.

It is further stipulated and agreed that, at all times during the continuance of this mortgage, it will promptly, and before any penalty or forfeiture shall attach, in due season pay or cause to be paid all taxes, levies, and assessments laid upon it or its property or assets by [ay] lawful authority; and in case of failure to do so, the said trustee may pay the same, and add the same to the sum secured by this mortgage, and the same, with six per cent interest, shall be preferred to the debt evidenced by said bonds and coupons; and any breach of this agreement for the payment of taxes for the space of three months shall entitle the trustee to declare the whole sum due, and to enter and take possession, or to foreclose this mortgage, or both; and it is further stipulated and agreed that, during the continuance of this mortgage, the said first party will not do, or suffer to be done any acts whereby the security of the said bondholders shall be in [amy] way or manner or in any amount impaired.

19th. It is understood and agreed that, all the conveyances, covenants, agreements, and stipulations, herein mentioned, and contained apply to and bind as well the successors and assigns of the respective parties, as the parties themselves.

20th. It is hereby declared that the receipt or receipts of the trustee shall be sufficient discharge to the purchaser or purchasers, at any sale or sales made by the said trustee, under or in pursuance of any or either of the provisions for that purpose herein contained, for his or their purchase money; and that [sudh] purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after payment thereof, and having such receipt, be liable to see to its being applied for or upon the purposes and trusts of these presents, or in any
51 manner howsoever be answerable for any loss, misapplication or non-application of such purchase moneys, or any part thereof; or be obliged to inquire into the necessity, expediency, or authority of or for any such sale.

21st. No delay or omission of the said trustee or the holders of the bonds secured hereby, in respect of any default happening or continuing as aforesaid, to exercise the rights and powers arising therefrom, as hereinbefore provided, shall be held to exhaust or impair such rights and powers, or be con-

strued to be a waiver of such defaults; but it is hereby mutually agreed, as a condition, subject whereto the bonds secured hereby are issued and held by each successive holder, and that the holders of a majority in interest, at any time outstanding, may be an instrument under their hands and seals, or resolution adopted at a meeting of such bondholders, waive or instruct the trustee to waive, any default occur-ing, and the rights accruing therefrom, on such terms and conditions, or without any conditions, as to such majority may seem proper; provided always, that no such action of the bondholders shall extend to or be taken to affect any subsequent default, or impair the rights resulting therefrom, unless expressly provided for. Any such majority of bondholders may in like manner, if upon default, as hereinbefore provided, the principal of all or any of the bonds hereby secured shall have become or be by said trustee de-lared, due and payable before the period therein mentioned for the payment thereof shall have expired, waive such default or reverse the action of said trustee in that behalf; and on default in the payment at maturity of the principal of any of the bonds secured hereby, such majority may, in like manner, waive such default and any rights arising thereunder respecting any bonds secured hereby not then matured, and extend the time for the payment of the principal of such as shall have matured, or any part thereof, for such period or periods not exceeding five years, with provisions for interest in the meantime, as to such majority shall seem proper provided the rate of interest
52 shall not be reduced unless the reduction be uniform on all the bonds at the time outstanding, and ratable on the rate therein provided respectively; and if, upon any default as aforesaid, the said trustee, shall, either on his own motion or after requisition and i-demnification, proceed to execute the power of entry, or that of sale, or both, or take legal proceedings for the enforcement of the rights of the bondholders accruing from such default it shall be competent for such majority in interest, in manner aforesaid, to instruct the said trustee to suspend or postpone the execution of such powers, or the prosecution of such legal proceedings, for a period, definite or indefinite, but not longer than five years, with such uniform provisions with regard to interest accruing or principal maturing in the meantime, and arrears of interest on bonds matured, as to such majority may seem expedient; which instruments, if so given, shall be controlling and shall be conformed to; and any such action by the majority as in this article provided, shall be binding and conclusive upon all the bondholders, the intent of this provision being to afford time for the resuscitation of the Company's finances, in case of disaster thereto, or disappointment of the present

[exspectations], if a majority in interest of such bondholders shall deem it expedient.

22nd. On any sale, whether by the said trustee or the Court, of the property hereby conveyed, or any part thereof, the trustee shall have the right to buy in the same, and a majority in amount of the bondholders of the outstanding bond shall have the right, by a written instrument, under the hands and seals of such majority, to fix a sum, which it shall be the duty of the trustee to bid for the property to be sold, on behalf and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of the said trustee, or a court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of these presents, and of the proportion of such sum payable to the bondholders not concurring in such
53 request. On any purchase the trustee shall hold the property so purchased upon trust, for the equal benefit of the bondholders who had required the trustee to buy in the property in their behalf, as the absolute property of said bondholders, without any right of redemption or resale in favor of said Company or any bondholder.

23rd. The trustee shall have power to release from the lien of this mortgage any land, machinery, or other property which has become useless for the purposes of the company for any cause, but only on condition that such property be forthwith replaced by other property of equal value and subject to the lien of these presents.

24th. And whereas, by distance and lapse of time, or other accident, the dates of the actual execution of this Indenture of Mortgage and trust, by the various parties thereto, may be previous or subsequent to the day on which it bears date, now it is expressly agreed and declared that this indenture of mortgage and trust shall be dated the first day of July, A. D. 1887, and shall be valid and effectual as if executed on the day of the date thereof,; and this Indenture of mortgage, and trust is the indenture of mortgage referred to in the bonds hereinbefore mentioned, the form whereof is hereinbefore set forth, and is made and executed by and between the parties hereto, and as for the Indenture of mortgage and trust securing and intended to secure said bonds, as in the said bonds is mentioned and recited.

And in further consideration of the premises, the said first party, for itself, its successors and assigns, doth [covenent], grant, bargain and agree to and with the said second party, its successors and assigns, that it is well seized of all the

mortgaged property and assets; and there is no incumbrance on any of its property, rights, choses in action, or assets hereby conveyed or intended so to be, except a mortgage executed by the said City Water Works Company of Omaha to secure said four hundred (400) bonds and that all said rights, privileges, easements, estate property real and personal, effects and assets, hereby [vonveyed] and mortgaged, or in-
54 tended so to be, against all lawful claims, except said mortgage, it will forever warrant and defend.

And in further consideration of the premises, the said first party for the further assurance of the second party and of the holders of said bonds, doth covenant, grant, bargain and agree to and with the second party, that it will at any time in the future, upon demand, at its own expense, execute, deliver and record, (if proper for record) all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects and assets, now owned by it, whether covered by this conveyance or not, situate in the said County of Douglas in the State of Nebraska, and of any right, privilege, easement, estate, choses in action, property real and personal, effects and assets, which it [amy] at any time hereafter acquire in said County of Douglas and State of Nebraska, and in any wise connected with the property mortgaged, as the second party may demand, to subject the same to the lien of this mortgage and such further and other conveyances, assignments and supplementary mortgages, shall be deemed a part of this instrument, and form together one security for the payment of the debt evidenced by said bonds and coupons.

And in further consideration of the premises, the said first party doth covenant, bargain and agree to and with the said second party that during the continuance of this mortgage it will not suffer or permit any lien of mechanics or material, men or others of any kind, or any incumbrance of any kind, upon any of the property hereafter to be acquired, or assets, which shall be a prior lien to the lien of this mortgage, or before the execution of an instrument subjecting the same to the lien of this mortgage.

The recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any
55 statement therein contained.

In Witness Whereof The said The American Water Works Company hath caused these presents to be executed by

its President and Secretary and sealed with its corporate seal at the City of Chicago in the County of Cook and State of Illinois, this first day of July, A. D. 1887.

THE AMERICAN WATER WORKS COMPANY.

[L. S.] By J. R. CUSTER, President.

JOSEPH A. GRIFFIN, Secretary.

In presence of

WILLIAM J. CAMPBELL.

State of Illinois,

County of Cook—ss.

On this eleventh day of July, A. D. 1887, personally came before me, a notary public in and for said County, J. R. Custer, President and Joseph A. Griffin, Secretary of the said The American Water Works Company, personally known to me to be such officers, and to be the same persons who as such President and Secretary of the said The American Water Works Company executed the foregoing instrument by its name and in its behalf by them as such President and Secretary, and each acknowledged in behalf of said corporation that the foregoing instrument was the free and voluntary act and deed of the said The American Water Works Company, executed by it for the uses and purposes therein mentioned.

[L. S] BEN S. MAYER,

Notary Public. [L.S.]

The Farmers' Loan and Trust Company of New York, above named, hereby accepts the trust [crested] by the foregoing instrument.

Dated New York 13th July A. D. 1887.

THE FARMERS' LOAN AND TRUST COMPANY.

By R. G. ROLSTON, President.

Attest WM. H. LEUPP, Sec'y. [L. S.]

56 Witness,

EDWIN F. CONEY.

State of Illinois,

Cook County—ss.

I, Henry Wulfe, Clerk of the County Court, of Cook County, the same being a Court of record, Do Hereby Certify that Benj. S. Mayer Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the Cook County duly Commissioned,

sworn and acting as such and authorized to take the same; that I am well acquainted with his handwriting and verily believe that the signature to the said proof or [acknowlwdgment] is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Chicago, in the said County, this 11th day of July, 1887.

[L. S.] HENRY WULFF, Clerk.

State, County, and
City of New York—ss.

On this thirteenth day of July, A. D. 1887, personally appeared before me a notary public in and for said County of New York, Rosewell G. Rolston President of the Farmers' Loan and Trust Company, of New York, and known by me to be such officer and to be the same person who as such President of the said The Farmers' Loan and Trust Company of New York, executed the foregoing instrument in its name and in behalf by him as such President and acknowledged in behalf of said corporation that the foregoing instrument was the free and voluntary act and deed of the said The Farmers' Loan and Trust Company of New York, executed by it
57 for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official Seal the day and year last aforesaid.

[L. S.]

EDWIN F. COREY,
Notary Public.

State of New York,
City and County of New York—ss.

I, James A. Flack, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of record, Do Hereby Certify, that Edwin F. Corey whose name is subscribed to the Certificate of the proof and acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public and for the City and County of New York, dwelling [—] the said City, commissioned and sworn and duly authorized to take the same. And further that I am well acquainted with the handwriting of such

Notary, and verily believe that the signature to the said Certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Court and County, the 14th day of July, 1887.

[L. S.] JAMES A. FLACK,
Clerk.

EXHIBIT "B."

This Indenture, made and entered into this sixteenth day of January, A. D. 1889, by and between the American Water Works Company, a corporation organized under the laws of the State of Illinois and having its principal office at the City of Chicago, Illinois, party of the first part, and The Farm-
58 ers' Loan and Trust Company [Company], of the City, County, and State of New York, a corporation organized under the laws of the State of New York, having its principal office at the City of New York, as trustee, party of the second part, Witnesseth:—

That Whereas, the said first party is a corporation organized under the laws of the State of Illinois having its principal office and place of business at the City of Chicago, Cook County, in the State of Illinois;—

And Whereas, the said first party is authorized to build, equip and operate works to supply water to cities, towns, and villages, and municipal and other corporations, to acquire by purchase lease or otherwise such works, and operate and deal in stocks and bonds of other corporations organized for a similar purpose, both in the said State of Illinois and elsewhere:—

And Whereas, the said first party heretofore purchased of and from the City Water Works Company of Omaha, a corporation organized under the laws of the State of Nebraska, its water works including the real estate connected and used with the same, by means of which the said City of Omaha and its inhabitants were and are supplied with water for fire and other purposes, including the contract under which the said City Water Works Company of Omaha furnished and supplied water to the City of Omaha, and all contracts with private consumers:—

And Whereas, after said purchase, and on the first day of July, A. D. 1887, the said first party made, issued and delivered to the said second party its four thousand negotiable bonds of one thousand dollars ($1000) each, numbered consecutively from number one to number four thousand, both inclusive,

bearing date July 1st, 1887, due and payable July 1st 1907, with interest at six per cent per annum, payable semi-annually according to the forty coupons annexed to said bonds:—

And Whereas, on the said first day of July, A. D. 1887,
59 the said first party, in order to secure the payment of said four thousand bonds, made, executed, and delivered to the said second party, as trustee, its certain mortgage or deed of trust, duly executed by said first party, which said mortgage has been duly recorded in the office of the Register of Deeds of Douglas County, Nebraska, in Book 67 of Mortgages at page 598, and which said mortgage or deed of trust is hereby referred to and made [a] a part of this instrument, and to which this instrument is supplemental:—

And Whereas, in and by said mortgage the said first party conveyed to the said second party as such trustee, for the uses and purposes in said mortgage or deed of trust expressed, all its property, real, personal or mixed, situated in the County of Douglas State of Nebraska, choses in action, debts, dues, demands, and assets of every kind and nature, including water rents from the said City of Omaha, and all water rents from private consumers wheresoever situate, and all income of any kind whatsoever, situate in or derived from any property or person in said County of Douglas, in the State of Nebraska, a more particular description of which is found in said mortgage or deed of trust:—

And Whereas, in and by said mortgage or deed of trust the said first party for the further assurance of the second party, and the holders of the bonds secured by said mortgage or deed of trust, did covenant and agree to and with the second party, that it would at its own expense execute, deliver and record all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects and assets then owned by it, situate in the County of Douglas and State of Nebraska, and of any rights privileges, easements, estate choses in action, property, real and personal, effects and assets, which it might at any time thereafter acquire in said County of Douglas and State of Nebraska, in any wise connected with the property mortgaged, to subject the same to the lien of said mortgage or deed of trust, and that such other and other conveyances, assignments, and supplementary mortgages
60 should be deemed a part of said instrument and form together one security for the payment of the debt evidenced by the said bonds and coupons.

And Whereas, since the execution of said mortgage the said first party has acquired large and valuable real estate in the

City of Florence, in the said County of Douglas, State of Nebraska, which said City adjoins the City of Omaha, on the north, and has thereon constructed large and expensive buildings, settling basins, pipe lines, and other structures, and has built and erected large pumping engines thereon, and laid at a large expense a line of thirty six inch main pipe to connect the same with the system of water works owned and operated by the Company in the said City of Omaha:

And Whereas, since the making of said mortgage [of] deed of trust the said first party has secured by purchase certain water works situate in the City of South Omaha, Douglas County, State of Nebraska, which said City of South Omaha, immediately adjoins the City of Omaha on the south, and has extended water works in the said City of South Omaha, and has connected the same with the water works of said first party in the City of Omaha so that they are operated together as one system:

And Whereas, the said first party has made large extensions of its pipe lines in the City of Omaha, and set up and erected new and additional machinery in said City of Omaha:

And Whereas, demand has been made upon said first party that it execute in accordance with the terms of said mortgage or deed of trust such supplementary mortgage or conveyance as is therein mentioned:

And Whereas, under the terms of said mortgage or deed of trust there have been delivered by said trustee, to the order of this Company, sixteen hundred of said four thousand bonds, numbered consecutively from number one to number sixteen hundred, both inclusive, and four hundred of said bonds, numbered from number sixteen hundred and one to number two thousand, both inclusive, are still held by said second
61 party under the terms of the trust in said mortgage or deed of trust [in] contained against the four hundred bonds which were formerly issued by the City Water Works Company of Omaha, and in said mortgage or deed of trust mentioned, and nine hundred of said bonds numbered consecutively from number two thousand and one to number twenty-nine hundred both inclusive, have been under the terms and trusts in said mortgage contained delivered upon the order of the said first party, and one hundred more of said bonds, being bonds numbered from number twenty-nine hundred and one to number three thousand, both inclusive, have been ordered to be delivered by the said second party and will be delivered by said second party upon the order of the first party in the month of February 1889, so that there will then remain in trust one

thousand of said bonds, viz:—bonds numbered consecutively from number three thousand and one to number four thousand, both inclusive, in trust with said trustee under the terms and provisions of said mortgage or deed of trust, subject, however, to be withdrawn under the terms and conditions [if] the trust in said mortgage or deed of trust mentioned.

And Whereas, the said first party, in the sale of such of its bonds as have heretofore been issued and sold has realized gold prices for the same:

And Whereas, by the terms of said bonds, and mortgage it is provided that the said first party may reduce the rate of interest on any of the last two million of said bonds prior to the sale thereof, to five per cent per annum.

And Whereas, all of said nine hundred bonds, numbered from number two thousand and one to number twenty-nine hundred, both inclusive, which have been delivered by said trustee upon the order of the first party are still the property of the first party and unsold:

And Whereas, the officers of the Company are able to better sell the bonds of the company lately issued and to be
62 issued at a lower rate of interest, provided the same are made payable in gold coin of the United States of the present standard of fineness:

And Whereas, in order to make any of said bonds payable in gold coin of the United States it is necessary to make them all so payable, both those already issued and sold; and those which may hereafter be issued or sold.

And Whereas, the Board of Directors of said first party has by resolution duly determined to reduce the rate of interest of said one thousand bonds numbered from number two thousand and one to number three thousand, both inclusive, to five per cent per annum, and has determined to have written, printed, or stamped on each of said last mentioned one thousand bonds the words "Interest upon this bond reduced to and fixed at five per cent per annum before issue," and on each of the coupons the words "Reduced to twenty-five Dollars," and has for the purpose aforesaid determined by resolutions to make all of said bonds and the coupons thereon payable in the United States gold coin of the present standard of fineness, and has directed that all said nine hundred bonds, numbered consecutively from number two thousand and one to number twenty-nine hundred both inclusive, in its possession, and all the said remaining eleven hundred bonds now in possession of said trustee, viz:—bonds numbered from number twenty-nine

hundred and one to number four thousand both inclusive, have written, printed, or stamped on the face of each bond the words following: "This bond and the coupon thereon will be paid at maturity in United States gold coin of the present standard of fineness", and has directed the said trustee, the said second party hereto, to cause upon request of the holders of the bonds of this Company, heretofore issued and sold, numbered from number one to number sixteen hundred, both inclusive the same words, and has also directed the said trustee to cause the said four hundred bonds so held in trust by it as aforesaid, and numbered from number sixteen hundred and one to number two thousand, both inclusive, to be stamped or printed on the face thereof with the same words:

63 And Whereas, The said Board of Directors of said first party by further resolutions resolved to make such supplementary mortgage as aforesaid, and also to provide therein for securing the payment of all said four thousand bonds, principal and interest, as they respectively become due, and with interest at the rate of six per cent per annum on the first two thousand of said bonds and at five per cent on the next one thousand thereof, and at six per cent on the last one thousand thereof, unless it should be hereafter determined to reduce the rate to five per cent thereon, upon all the property theretofore mortgaged or conveyed, and all property subsequently to the making of said mortgage or deed of trust acquired by the Company, and such as may be hereafter acquired in said County of Douglas in such gold coin of the United States of the present standard of fineness:

Now Therefore, Know All Men By These Presents: That the said The American Water Works Company, party of the first part, in pursuance of and by the authority of law, and in pursuance of the said proceedings and determinations of the Board of Directors heretofore set forth, in order to comply with the said covenant in said other mortgage or deed of trust mentioned, and to secure the payment of the principal and interest of all the bonds above described with pro rata equality, and to secure their payment, principal and interest in gold coin of the United States of the present standard of fineness, and in consideration of the premises and other divers other good and valuable considerations it thereunto moving, the receipt whereof it hereby confessed and acknowledged, hath granted, bargained, sold, released, remised, enfeoffed, confirmed and conveyed, and by these presents doth grant bargain, sell, release,remise, [enfoeff], confirm and convey, unto the party of the second part, its successors and assigns, as such trustee, for the uses and purposes, and subject to the con-

ditions and trusts in such mortgage or deed of trust and
64 in this instrument expressed, all the privileges, franchises, easements, choses in action, estate, property, real and personal, effects and assets, in the said County of Douglas, and State of Nebraska, which were conveyed by said mortgage or deed of trust and also all the privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, which the said first party has acquired since the making of said mortgage or deed of trust in the said County of Douglas, and State of Nebraska, or which it now has in said County of Douglas and State of Nebraska, whether or not the same be mentioned herein, among which are the following: that is to say: All and Singular the following described property situate, lying and being in the City of Florence, County of Douglas, and State of Nebraska, known, described and designated as follows: Beginning at a point eighty-five (85) feet South of the North-west corner of Block one hundred and twenty-seven (127) of the City of Florence, as surveyed, platted and recorded, and running south seven hundred and ninety-five feet (795), to the right of way of the St. Paul Minneapolis & Omaha Railroad, thence in a southerly and easterly direction along such right of way (a three degree curve) to a point one thousand eight hundred and sixty-seven (1867) feet (end of curve); thence south two hundred and sixty-three (263) feet; thence east one hundred and five (105) feet; thence south two thousand three hundred and sixty-five (2365) feet to the right of way of the aforesaid St. Paul, Minneapolis & Omaha Railroad; thence in a southeasterly direction along said right of way seventy (70) feet; thence east nine hundred and thirty-five (935) feet to the south-west corner of Block number two hundred and sixty-three (263) of the City of Florence, as surveyed platted and recorded; thence north one thousand three hundred (1300) feet; thence east six hundred and sixty (660) feet; thence north one hundred and ninety-five (195) feet (more or less) to the west bank of the Missouri River.

Thence in a northeasterly and northerly direction along
65 the bank of said river until intersecting with the [easy] and west line through the north-west corner of Block number one hundred and twenty-seven (127) (said line being the same as the north line of said Block and the south line of Bridge Street) of the City of Florence as surveyed, platted and recorded; thence west five hundred and ninety-five (595) feet (more or less) and thence in a south-westerly direction one hundred and seventy-five (175) feet to the point of beginning containing one hundred and twenty-five (125) acres of land (more or less).

Also Lots one (1), two (2), four (4), five (5), and eight (8) Block No. 2, and the whole of Block No. two hundred and sixty (260) all of the City of Florence, as surveyed, platted, and recorded.

And also all the water works, mains, pipe, machinery, stand pipe, chattels real, real estate, effects, choses in action, and assets of the first party in the City of South Omaha, in said County of Douglas, and State of Nebraska, including all water rentals, debts, dues, and demands, and choses in action, of every kind and nature, both water rents, from the said City of South Omaha, in and by virtue of the contract by and between the said City of South Omaha, and the said first party, and in and by virtue of a contract now existing or which may hereafter exist between the said City of South Omaha and the first party, or its assigns, which enures or may enure to the benefit of the said first party and its assigns, and all water rents from private consumers wheresoever situate, and all other income of whatsoever kind from any property of said Company or source whatsoever, in said County of Douglas and State of Nebraska.

And the said party of the first part hereby makes, constitutes and appoints the party of the second part its successor or assigns, its true and lawful attorney, in fact, in its name and in its place and stead to have, receive, sue for, demand, collect and receipt for all said debts, dues, demands, choses in action, and water rents, by said above mentioned
66 mortgage or deed of trust and by this instrument conveyed for the purpose of the trust in said mortgage or deed of trust and this instrument expressed, and this instrument shall further work and be an absolute assignment of said debts, dues, demands, choses in action and water rental, both those now existing or which may at any time hereafter exist or be derived in said County of Douglas, and of the property of the said first party in the said County of Douglas, to the said second party as trustee to and for the uses and purposes expressed hereinafter.

To Have And To Hold, the said rights, privileges, demands, choses in action, property real or personal, estate choses in action, effects and assets above conveyed to the said second party as trustee, its successors and assigns, in trust forever and subject to the following stipulations, covenants, and agreements as trustee, that is to say:

First: This instrument is given for the purpose of securing the payment according to the provisions in the said mortgage and deed of trust contained of the principal and interest of all the four thousand bonds therein mentioned, as the same sev-

erally and respectively hereafter become due, and according to the rate at which the same shall hereafter bear interest in gold coin of the United States of the present standard of fineness.

Second: This instrument is to be deemed, together with the said mortgage or deed of trust, one instrument.

Third: All the provisions in said mortgage or deed of trust contained for the possession by the first party previous to any default for defeasance and all the conditions, agreements and covenants in said mortgage contained, are herein repeated and made part hereof, and all the provisions in said mortgage or deed of trust contained for the protection of the trustee and the limiting its liability are made a part of this instrument as if herein again specially written.

67 Fourth: The said first party in consideration of the premises hereby covenants to and with the second party that it is well seized of all mortgaged property, and asserts that, there is no incumbrance on its property, rights, choses in action, or assets hereby conveyed or intended so to be, except as mentioned in said mortgage or deed of trust, and that all said rights, privileges, easements, estates, property real and personal, effects and assets, hereby conveyed and mortgaged or intended so to be, against all lawful claims, except said mortgage given by the said City Water Works Company of Omaha to secure said four hundred bonds, it will forever warrant and defend, and in further consideration of the premises the said first party for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and with the second party that it will at any time in the future upon demand, at its own expense, execute, deliver and record all such further and other conveyances, assignments and supplementary mortgages, of the rights, privileges, easements, estate, choses in action, property real or personal, effects, and assets, now owned by it, whether covered by these presents or not, situate in the County of Douglas, and the State of Nebraska, and of any right, privilege, easement, estate chose in action, property real and personal, effects and assets, which it may own at any time hereafter in said County of Douglas, and State of Nebraska, and in any wise connected with the property mortgaged, and the second party may demand; to subject the same to the lien of said mortgage or deed of trust hereinbefore mentioned and the provisions of this instrument, and such further and other conveyances, assignments, and supplementary mortgages shall be deemed a part of said mortgage or deed of trust heretofore mentioned, and this instrument, and form together one

security for the payment of the debt evidenced by said bonds and coupons in gold coin of the United States of the present standard of fineness.

68 The recitals herein contained are made on behalf of the party of the first part, and the part of the second part assumes no responsibility as to the correctness of any statement herein contained.

And Whereas, by reason of distance and lapse of time or other accidents the date of the actual execution of this indenture and mortgage or deed of trust by the various parties thereunto may be prior to or subsequent to the day on which it bears date, now it is expressed, agreed and declared that this indenture and mortgage or deed of trust shall be dated the 16th day of January, A, D. 1889, and shall be valid and effectual as if executed on the day of the date thereof.

In Witness Whereof, the said The American Water Works Company hath caused these presents to be executed by its President and Secretary, and sealed by its corporate seal, this 16th day of January, A. D. 1889.

THE AMERICAN WATER WORKS COMPANY.
By W. A. UNDERWOOD,
President.

[L. S.] By W. H. HALL, Secretary.

State of Nebraska,
Douglas County—ss.

On this 5th day of February, A. D. 1889, personally came before me a Notary Public, in and for said County, W. H. Hall personally known to me to be the Secretary and Assistant Manager of The American Water Works Company, and he acknowledged that the said The American Water Works Company has executed the fore-going instrument, and that the same was the free and voluntary act and deed of said The American Water works Company.

Witness my hand and the official Seal the day and year above written.

69 [L. S.] FRANK B. RODEFER,
Notary Public.

State of Massachusetts,
County of Suffolk—ss.

On this 16th day of March A. D. 1889, personally came before me, a notary public in and for said County, William A. Underwood personally known to me to be the President of the American Water Works Company, and he acknowledged

that the said The American Water Works Company had executed the foregoing instrument, by him as President and that the same was the free and voluntary act and deed of said The American Water Works Company.

Witness my hand and the official Seal the day and year above written.

[L. S.] LLOYD BRIGGS,
Notary Public.

Commonwealth of Massachusetts,
Suffolk—ss. Clerks Office
of Superior Court.

I, Jos, A. Willard of Boston, in said County, duly elected, qualified and sworn as Clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston, in said County said Court being a court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby, in the performance of my duty as said Clerk, certify and attest that Lloyd Briggs before whom the annexed affidavit, proof or [acknowledgem-nt] was taken or subscribed, is a Notary Public for and within said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of the said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and certify proofs and acknowledgments of deeds of conveyances of lands, tenements and hereditaments, lying and being in said Commonwealth; that
70 he was at the time of taking the affidavit, proof or acknowledgment, hereto annexed, such Notary Public that due faith and credit are and ought to be given to his official acts; that I am well acquainted with his signature and [handwritung], and I verily believe that the signature to the said affidavit, proof or acknowledgment is genuine, and further that the annexed instrument is executed and [and] acknowledged according to the laws of said Commonwealth.

Witness my hand, and the Seal of said Court, at Boston, in said County, and Commonwealth, this Sixteenth day of March A. D. 1889.

[L. S.] JOS. A. WILLARD, Clerk.

The Farmer's Loan and Trust Company of the City of New York, the party of the second part in the within instrument, mentioned, hereby accepts the trusts therein mentioned

and conferred upon it, according to the terms of said instrument and the original mortgage, to which this is a supplement.

In Witness Whereof, the said The Farmer's Loan and Trust Company hath caused this instrument to be executed by its President and Secretary, and to be sealed with its corporate seal, on the day and year first in said instrument written.

THE FARMER'S LOAN AND TRUST COMPANY.
R. G. ROLSTON, President.
[L. S.] Attest, WM. H. LEUPP, Sec'y.

State of New York,
City and County of New York—ss.

Now on this 19th day of March A. D. 1889, personally
71 came before me, a Notary Public in the aforesaid County, Rosewell G. Rolston, and William H. Luepp personally known to me to be the President and Secretary of said The Farmers' Loan and Trust Company of the City of New York, the maker of the foregoing acceptance of trust, and acknowledged that the said The Farmer's Loan and Trust Company had executed the foregoing instrument of acceptance by them as such President and Secretary and that such instrument of acceptance was the free and voluntary act and deed of said The Farmer's Loan and Trust Company.

Witness my hand and official Seal the day and year above written.

C. A. SEARLS,
[L. S.] Notary Public, No. 206. New York Co.

State of New York,
City and County of New York—ss.

I, Edward F. Reilly, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify, that C. A. Searls, whose name is subscribed to the Certificate of proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the City and County of New York, dwelling in said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said Certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Court and County the 19th day of March, 1889,

[L. S.] EDWARD F. REILLY, Clerk.

Upon the back of said Bill of Complaint appear in-
72 dorsements in the words and figures following, to-wit:—
No. 96 Q. United States Circuit Court District of Nebraska. The Farmers' Loan and Trust Company, vs. The American Water Works Company. (original) Bill of Complaint. Turner, McClure & Rolston, 22 William Street, New York, C. H. LaMar, Complainant's Solicitors. Filed Oct. 9, 1893. Elmer D. Frank, Clerk.

Thereupon afterwards, at the May 1893 Term of said Court, on the 13th day of October, 1893, the following proceedings were had and done in said case, as appears of record on folio 772 Journal "R" of said Court, to-wit:—

The Farmers' Loan & Trust Company, of New York, Complainant,

96 Q. vs.

American Water Works Company, a corporation, organized and existing under and by virtue of the laws of the State of Illinois, and The American Water Works Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, E. Hyde Rust, suspended Receiver and Alonzo B. Hunt, Temporary Receiver of the American Water Works Company of New Jersey, Defendants.

This cause coming on to be heard upon the application of the Farmers' Loan and Trust Company of New York for the appointment of a Receiver, for the American Water Works Company, and the Court being fully advised in the premises.

It Is Ordered, that Ellis L. Bierbower and Alonzo B. Hunt be and they are hereby appointed Receivers of the American Water Works Company of New Jersey, and also of the American Water Works Company of Illinois, to take possession and control of all and singular the goods, rights, franchises, [shoses] in action and property, both real and personal, of every name and nature of the said American Water Works Company of Illinois and the American Water Works Company of New Jersey, situate in Douglas County, Nebraska; together with all the privileges, easements and franchises of said companies in Douglas County, Nebraska; also all the water works, mains, pipes, machinery, stand-pipes, assets, effects, chatteis,
73 real or personal, owned by said defendant companies in Douglas County, and including the following real estate:—

1st: Beginning at the intersection of Lowe Avenue and the north line of Nicholas Street, thence North Two Hundred and Ninety-eight (298) feet, thence East Six Hundred and Four

(604) feet, thence South Two Hundred and Ninety-eight (298) feet, to Nicholas Street, thence West Six Hundred and Four (604) feet to place of beginning.

2nd: Beginning at a point where the west line of Pleasant Street intersects the South line of Hamilton Street, thence Westerly Four Hundred and Thirty-three (433) feet, thence South Seven Hundred Four and Eight-tenths (704 8/10) feet, to the North line of Nicholas Street, thence East Four Hundred and Thirty-three (433) feet, to Pleasant Street, thence North Seven Hundred and Twenty-five (725) feet to the place of beginning.

3rd: Beginning at the intersection of the East line of Lowe Avenue with the South line of Hamilton Street, thence Easterly on the South line of Hamilton Street Six hundred and Four (604) feet, thence South Four Hundred and Six and eight-tenths (406 8/10) feet, thence West parallel with the half section line Six Hundred and Four (604) feet to the East line of Lowe Avenue, thence North on the East line of Lowe Avenue Four Hundred and three tenths (403 3/10) feet to the place of beginning.

4th: Lots One (1), Two (2), Three (3), Four (4), Five (5), six (6) Seven (7) and Eight (8), in Block Q in the City of Omaha, according to the recorded plat thereof.

5th: Lots One (1), Two (2), Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the recorded plat thereof.

Also the rentals, debts, demands, choses in action of every kind and nature, including water rents from the said City of Omaha under and by virtue of a contract made between the said City of Omaha, and one Sidney E. Locke, and afterwards assigned by said Locke to the said City Water Works Company, and by said first named corporation, to the American Water Works Company and under and by virtue of any contract now existing, or which may hereafter exist between the City of Omaha, and the American Water Works Company of ————, or which enures to the benefit of the said American Water Works Company and its assigns, by assignment or otherwise, and all water rents from private consumers wheresoever situate, and all other income of any kind whatsoever from any property or person in said County of Douglas and State of Nebraska; and any and all debts, dues, demands, choses in action and water rentals now existing or which may at any time hereafter exist, or be derived in said County of Douglas, and of the property of said American Water Works Company; and also all the property, franchises,

74

privileges, easements, choses in action, estate, real and personal, effects and assets [monies] due and to become due, in the County of Douglas and State of Nebraska belonging either to the American Water Works Company of Illinois or the American Water Works Company of New Jersey.

With power and authority to operate said Water Works and their property, and carry on the business of said mortgagor company under the protection of this Court, with all the usual duties and powers of Receivers in such cases, and with authority to proceed to recover by suit or otherwise all property in the hands of other parties belonging to the said mortgagor Company, The Farmer's Loan And Trust Company of New York, and all [monies] justly due it and which are unlawfully withheld by any person under any pretense whatever. Bond in sum of Twenty Thousand Dollars to be given by each of said Receivers, with usual conditions, &c., to be approved by Judge. Current expenses may be paid out of the proceeds arising from the business of defendants and as often as a surplus of $1,000.00 shall remain in hands of Receivers after paying current expenses &c., the said surplus must be paid into the Registry of the Court as provided by law,
75 and the rules and practice of the Court.

All persons are enjoined from interfering with the property above described whilst in the hands of said Receivers, or either of them. Bonds to be give- within ten days from this date, after the approval of which, immediate possession of said property to be taken by said Receivers.

13 Oct. 1893.

(Sgd.) ELMER S. DUNDY, Judge.

Thereupon afterwards, to-wit:—on the said 13th day of October, 1893, a bond of Alonzo B. Hunt was filed in said case, which said Bond is in the words and figures following, to-wit:—

In the Circuit Court of the United States, District of Nebraska.

The Farmer's Loan and Trust Company of New York, Complainant.

vs.

The American Water Works Company of New Jersey, et al., Defendants.

Know All Men By These Presents, That we Alonzo B. Hunt, as principal, and Solon L. Wiley and Victor G. Lantry as sureties, are held and firmly bound unto the complainants and defendants herein and the stock-holders and creditors of the

corporations defendant herein and all others in interest in the penal sum of Twenty thousand Dollars ($20,000.00) to the payment of which, well and truly to be made they do bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Yet upon this condition; That Whereas, the said Alonzo B. Hunt has been appointed Receiver of the American Water Works Company in Douglas County in a certain suit wherein the Farmer's Loan & Trust Company, is Complainant, and the American Water Works Company of New Jersey and others are defendants.

Now, if the said Alonzo B. Hunt shall well and duly
76 perform his duties as Receiver, and shall well and truly account for all [monies] and other property coming into his hands as such Receiver, and shall in every respect obey all orders of the Court without negligence or misconduct while he shall occupy the position as Receiver, then this obligation shall be void, otherwise of force.

ALONZO B. HUNT,
SOLON L. WILEY
VICTOR G. LANTRY.

Approved 13th Oct. 1893.

ELMER S. DUNDY, Judge.

Upon the back of said Bond appear indorsements which is in the words and figures following, to-wit:—Doc. Q. No. 96. In U. S. Circuit Court. Farmer's Loan and Trust Company, Plaintiff, vs. American Water Works Company et al., Defendants. Bond of Alonzo B. Hunt. Filed Oct. 13, 1893. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit:—on the said 13th day of October, a bond of Ellis L. Bierbower was filed in said case, which said bond is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

The Farmer's Loan and Trust Company, of New York, Complainant.

vs.

The American Water Works Company of New Jersey, et al.,

Know All Men By These Presents, That we, Ellis L. Bierbower, as principal, and James E. Boyd as sureties, are held and firmly bound unto the Complainant and defendants herein and the stock-holders and creditors of the corporations defendant herein and all others in interest in the penal sum of

Twenty Thousand Dollars ($20,000.00), to the payment of which, well and truly to be made they do bind themselves, their Heirs Executors, Administrators and Assigns, jointly and severally, firmly by these presents.

77 Yet upon this condition: that Whereas, the said Ellis L. Bierbower has been appointed Receiver of the American Water Works Company in Douglas County, in a certain suit wherein the Farmer's Loan and Trust Company is complainant, and the American Water Works Company of New Jersey and others are defendants.

Now, if the said Ellis L. Bierbower shall well and duly perform his duties as Receiver, and shall well and truly account for all [monies] and other property coming into his hands as such Receiver and shall in every respect obey all orders of the Court without negligence or misconduct while he shall occupy the position as Receiver, then this obligation shall be void, otherwise of force.

ELLIS L. BIERBOWER,
JAMES E. BOYD.

Approved 13 October, 1893.

ELMER S. DUNDY, Judge.

Upon the back of said Bond appear endorsements in the words and figures, following, to-wit:—Doc. Q. No. 96. In U. S. Circuit Court. Farmer's Loan and Trust Company, Plaintiff, vs. American Water Works Company, et al., defendants. Bond of Ellis L. Bierbower. Filed Oct. 13, 1893. Elmer D. Frank, Clerk.

Thereupon afterwards, to-wit:—on the 9th day of October, 1893, a Subpoena in Chancery was duly issued in said case, and returned and filed October 21, 1893, which said Subpoena is in the words and figures following, to-wit:—

United States of America,
District of Nebraska—ss.

The President of the United States of America. To The American Water Works Company of Illinois, The American Water Works Company of New Jersey, E. Hyde, Rust a suspended Receiver of the American Water Works Company of New Jersey, and Alonzo B. Hunt temporary Receiver of the American Water Works Company.

Greeting: We command you and each of you to appear before the Judges of the Circuit Court of the United
78 States for the District of Nebraska, at Omaha, on the first Monday in November next, it being the Sixth day

of November A. D. 1893, to answer to the Bill of Complaint of the Farmer's Loan and Trust Company, this day filed in the office of the Clerk of said Court and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 9th day of October, A. D. 1893, and of the Independence the 118th year.

[Seal] ELMER D. FRANK, Clerk.

MEMORANDUM.

The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court at Omaha aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly,

ELMER D. FRANK, Clerk.

Attached to said Subpoena are the Returns of the Marshal in the words and figures following, to-wit:

District of Nebraska—ss.

I hereby certify and return, that on the 20th day of October 1893, I received the within Subpoena in Chancery and that after diligent search, I am unable to find the within named defendants, The American Water Works Company of Illinois, The American Water Works Company of New Jersey
79 E. Hyde Rust as suspended Receiver of the American Water Works Company of New Jersey, within my District.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.
By A. E. COGGESHALL.
Deputy United States Marshal.

Marshals Cost, $.....

District of Nebraska—ss.

I hereby certify and return that on the 20th day of October, 1893, I received this Subpoena in Chancery and on the 20th day of October 1893, I served the same upon the within named Alonzo B. Hunt Temporary Receiver of the American Water Works Company, In Douglas County, State and District of

Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.
By A. E. COGGESHALL
Deputy United States Marshal.

Upon the back of said Subpoena appear endorsements in the words and figures following, to-wit:—No. 96. Doc. Q. Circuit Court of the United States for the District of Nebraska. In Chancery. The Farmer's Loan and Trust Company. vs, The American Water Works Company et al., Subpoena in Chancery. Returnable to rule day first Monday in November, 1893. Elmer D. Frank, Clerk. Filed Oct. 21st, 1893. Elmer D. Frank, Clerk. Turner McClure and Rolston and C. H. Lamar, Comp'ts Sol. Marshal's Costs Service $2.00 Mileage $.12. Total $2.12.

Thereupon afterwards, to-wit—on Dec. 1, 1893, an Affidavit for Order on Non-Resident Defendant, was filed in said case which said Affidavit for Order on Non-Resident Defendant is in the words and figures following, to-wit:—

80 In the United States Circuit Court, District of Nebraska, ss.

The Farmer's Loan and Trust Company,
vs.
The American Water Works Company, et al.,

C. H. Lamar being duly sworn, says he is Solicitor in the above entitled cause, that the said cause is a suit in equity, the object of which is to enforce a Mortgage Lien against Real and personal property which is within the said District, that The American Water Works Company a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, E. Hyde Rust, as Receiver of the American Water Works Company of New Jersey, The American Water Works Company a corporation, organized under and by virtue of the laws of the State of Illinois, defendants, in said suit, and are not inhabitants of nor found within the said District and have not voluntarily appeared thereto.

C. H. LAMAR.

Subscribed in my presence and sworn to before me this 29th day of November, 1893.

ELMER D. FRANK, Clerk.

Upon the back of said Affidavit for Order on Non-Resident Defendant appear indorsements which are in the words and figures following, to-wit:—

No. 96 Q. United States Circuit Court, District of Nebraska. The Farmer's Loan and Trust Company vs. The American Water Works Co., et al. Affidavit for Order on Non-Resident Defendant. Filed Dec. 1st, 1893. Elmer D. Frank, Clerk

Thereupon afterwards, to-wit:—At the November Term of said Court on the 1st day of December, 1893, the following proceedings were had and done in said case, as appears of record on folio 51 of Journal "S" of said Court, to-wit:—

ORDER ON ABSENT DEFENDANTS.

81 The Farmer's Loan and Trust Company, Complainant.
No. 96 Q. vs.
The American Water Works Company, Defendants.

And now, on this 1st day of December, A. D. 1893, being at the November Term. A. D. 1893, of the said Court, it having been made to appear to the satisfaction of the said Court, that this is a suit commenced to enforce a lien upon real and personal property within the said District, and that The American Water Works Company a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, and E. Hyde Rust as Receiver, of the American Water Works Company of New Jersey, and The American Water Works Company, a corporation, organized under and by virtue of the laws of the state of Illinois, defendants herein, are not inhabitants of and have not been found within the said District and have not voluntarily appeared in this suit on motion of C. H. Lamar Solicitor for the said complainant, it is considered by the Court and ordered that the said defendants above named be and are hereby directed to appear and plead, answer, or demur to the Complainant's Bill of Complaint, on or before Monday February fifth A. D. 1894. and that in default thereof, an order be entered, in this cause, taking the said bill pro confesso.

It is further ordered by the Court that at least twenty days before the said fifth day of February A. D. 1894, a copy of this order be served upon the American Water Works Company, a corporation, organized under and by virtue of the laws of the State of Illinois, and E. Hyde Rust as Receiver of the American Water Works Company of New Jersey, and The American Water Works Company, a corporation organized under and by the virtue of the laws of the State of New Jersey, the said defendants wherever found if practicable, and
82 also upon the person or persons in possession or charge of the real property described in complainant's bill of

complaint, if any there be, or in lieu thereof a copy of this order be published for six consecutive weeks in the Omaha Mercury, a newspaper published and in general circulation in said District of Nebraska.

(Signed) ELMER S. DUNDY,
Judge.

Thereupon afterwards, to-wit:—On the 4th day of December, 1893, a Motion to quash service was filed in said case, which said Motion to quash service is in the words and figures following, to-wit:

In the United States Circuit Court, for the District of Nebraska.

Farmers' Loan & Trust Company,
vs.
American Water Works Co., et al.

Now comes the American Water Works Company of New Jersey, by John L. Webster, its solicitor, for the purpose of this motion and not otherwise, and moves the Court to quash the service of process herein, for the following reasons, to-wit:

1: The process according to return of the United States Marshal was not served upon any officer or agent of the Defendant Company but was served upon Alonzo B. Hunt, temporary receiver; that said Hunt as such receiver was not and is not an officer or agent of said Company upon whom process could be served in this action, the said receiver being an officer of the Court merely, and not a defendant in the suit.

2: Said process was not served upon the said Alonzo
83 B. Hunt in person, but was served by leaving a copy of the subpoena at his office, and that said copy so left at the office of said receiver was not a certified copy of the subpoena in chancery, as more fully appears by the affidavit hereto attached.

JNO. L. WEBSTER,
Sol. for American Water Works Co. of New Jersey.

Attached to said Motion is an Affidavit and copy of Subpoena in the words and figures following, to-wit:

State of Nebraska,
Douglas County—ss.

Alonzo B. Hunt, being first duly sworn deposes and says that no subpoena in the above entitled cause was served upon him in person, but that the subpoena attached hereto, and made a part of this affidavit, was left at his office, during his

temporary absence from the office, and that said subpoena was then in the form in which it now appears and that it did not and does not contain any certificate that it is a certified copy with all the indorsements thereon of the original Subpoena issued in said cause. And further deponent saith not.

ALONZO B. HUNT.

Subscribed in my presence and sworn to before me this 2nd day of December, 1893.

[Seal] HENRY M. MORRON,
Notary Public.

United States of America,
District of Nebraska—ss.

The President of the United States of America, To The American Water Works Company of Illinois, The American
84 Water Works Company of New Jersey, E. Hyde Rust, as suspended receiver of the American Water Works Company of New Jersey and Alonzo B. Hunt temporary receiver of the American Water Works Company,—Greeting:

We command you and each of you to appear before the Judges of the Circuit Court of the United States, for the District of Nebraska, at Omaha, on the first Monday in November, next, it being the Sixth day of November, A. D. 1893, to answer to the Bill of Complaint of The Farmer's Loan & Trust Company this day filed in the office of the Clerk of said Court, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness the Hon, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 9th day of October, A. D. 1893, and of the Independence the 118th year.

[Seal] ELMER D. FRANK, Clerk.

MEMORANDUM.

The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at Omaha, aforesaid, on or before the day to which the above writ is returnable, as above stated, the Complaint will be taken against them as confessed, and a decree entered thereon accordingly.

ELMER D. FRANK, Clerk.

Endorsed as follows:—No. 96 Q. Circuit Court of the Unite
States, for the District of Nebraska. In Chancery. Th
Farmers' Loan & Trust Company vs. The American Wate
Works Company. Subpoena in Chancery. Returnable t
Rule day first Monday in November, 1893. Elmer D. Frank
Clerk. Turner, McClure & Rolston and C. H. Lama
85 Comp'ts Sol.

Upon the back of said Motion to Quash Service appea
endorsements in the words and figures following, to-wit:

Doc. "Q." No. 96. U. S. Circuit Court, District of Ne
braska. Farmer's Loan and Trust Company, Plaintiff, v
American Water Works Co., Defendant. Motion to Quas
Service. Affidavit of A. B. Hunt. Filed Dec. 4, 1893. Elme
D. Frank, Clerk. Jno. L. Webster, Atty. for Deft.

Thereupon afterwards, to-wit:—On the 5th day of February
1894, Plea to Jurisdiction was filed in said case, which sai
Plea to Jurisdiction is in the words and figures following
to-wit:

86 In the Circuit Court of the United States, District o
Nebraska.

PLEA OF THE JURISDICTION.

The Farmer's Loan & Trust Company, Plaintiff,
In Equity. vs.
The American Water Works Company of the State of Illinois
The American Water Works Company of New Jersey, I
Hyde Rust, suspended receiver, and Alonzo B. Hunt
temporary Receiver, Defendants.

Now comes the American Water Works Company of New
Jersey, and the American Water Works Company of Illinois
respectively, and enter this their special appearance, for the
purpose of this plea and motion and not otherwise, and say
that this Court has no jurisdiction to hear and determine this
case, and the attempted service upon these defendants is
without authority of law and void, and that such service should
be quashed and this suit dismissed.

In support whereof these defendants say that the plaintiff
the Farmers' Loan & Trust Company is a citizen of the State
of New York, and that neither of these defendants are citizens
of the State of Nebraska, (District within which this suit is
brought), but that the American Water Works Company of
New Jersey is a corporation created and existing under and by
virtue of the laws of the State of New Jersey and having its
principal place of business in the State of New Jersey and is

a citizen of the State of New Jersey; and that the American Water Works Company of Illinois is a corporation organized and existing under and by virtue of the laws of the State
87 of Illinois, having its principal place of business in the City of Chicago, and is a citizen of the State of Illinois.

That E. Hyde Rust named in the Bill of Complaint as a defendant and described as "suspended receiver" is a resident and citizen of the State of New Jersey and that he had been suspended and removed as receiver of the property of the defendant companies within the District of Nebraska.

That Alonzo B. Hunt while acting as temporary receiver of the property of the defendant companies within the district of Nebraska was only an officer [of] representative of this Court and that neither said Rust nor said Hunt were necessary parties to this suit and that the naming of them as parties defendant in no manner confers upon this Court jurisdiction of this case, and in support of the averments of this plea reference is made to the averments in the bill of complaint in this case and also to the records and proceedings of this Court in the case of the Denver City Water Works Company et al., vs. The American Water Works Company et al, being case No. 35, App. Docket "P."

Wherefore these defendants pray that the attempted service of process upon them respectively may be quashed and set aside, and held for naught.

And that this suit be dismissed for want of jurisdiction of this court to hear and determine the same.

JNO. L. WEBSTER,
Sol. for The American Water Works Company (of Illinois) and the American Water Works Company (of New Jersey).

Upon the back of said Plea to Jurisdiction appear endorsements in the words and figures following, to-wit:

No. 96. Doc. Q. U. S. Circuit Court, District of Nebraska. Farmers Loan & Trust Company, vs. The American Water Works Co., et al. Plea to Jurisdiction. Filed Feb. 5, 1894. Elmer D. Frank, Clerk.

88 Thereupon afterwards, at the January 1894 Term of said Court, on the 14th day of April, 1894, the following

[proceddings] were had and done in said case as appears of record on folio 559 Journal "S" of said Court, to-wit:

DECREE.

Farmers Loan & Trust Company,
96 Q. vs.
The American Water Works Co. et al.

This matter having come on to be heard on the plea of the American Water Works Company (of Illinois) and the American Water Works Company (of New Jersey), to the jurisdiction of the Court, and after arguments of Counsel, and the Court being fully advised in the premises, it is ordered and decreed that the said plea of the defendant be, and the same is hereby overruled.

It is further ordered that these defendants have leave to answer within twenty days from this the 14th day of April, 1894, and that the complainant reply within twenty-five days from this date.

Thereupon afterwards, at the January 1894 Term of said Court, on the 20th day of April, 1894, the following proceedings were had and done in said case as appears of record on folio 571 Journal "S" of said Court, to-wit:

The Farmers' Loan & Trust Company,
vs.
The American Water Works Co. et al.

This day appeared John L. Webster, Solicitor for the American Water Works Company (of Illinois) and for the American Water Works Company (of New Jersey), and desired an exception noted to the order of the Court heretofore made overruling the plea of the defendants to the jurisdiction of the Court, and which exception is hereby allowed, it appearing that the said Solicitor for the defendants was not present at or notified the time and place when said order was made overruling said plea.

89 Thereupon afterwards, to-wit:—On the 30th day of April, 1894, an Answer of the American Water Works Company, (of Illinois) and the American Water Works Com-

pany (of New Jersey) was filed in said case, which said Answer is in the words and figures following, to-wit:

United States Circuit Court, District of Nebraska.

ANSWER OF THE AMERICAN WATER WORKS COMPANY, OF ILLINOIS AND THE AMERICAN WATER WORKS COMPANY, OF NEW JERSEY.

The Farmer's Loan and Trust Company, Complainant,
vs.
The American Water Works Company, (of Illinois), The American Water Works Company (of New Jersey), E. Hyde Rust, as Suspended Receiver and Alonzo B. Hunt, Temporary Receiver, Respondents.

The joint and several Answer of the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, and a citizen of the State of Illinois, and having its principal office and place of abode in the City of Chicago, in said State of Illinois and of the American Water Works Company a corporation organized and existing under the laws of the State of New Jersey and a citizen of the State of New Jersey and having its principal office and place of abode in the City of New Jersey in said State of New Jersey, to the Bill of Complaint of the Farmer's Loan and [Trsut] Company, a corporation duly created by and under the laws of the State of New York and a citizen of the State of New York, having its principal offices and place of abode in the City of New York, Complainant.

These defendants now and at all times hereafter saving and reserving to themselves all benefit and right of exception which can or may be had or taken to the many errors [uncertainities] and other imperfections in the said complainants' said bill of Complaint contained for their joint and several answer thereto or of so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants for answer say:

1. That this Court has no jurisdiction to hear and determine the matters involved in the Complainants' Bill of Complaint, and that the attempted service of process upon these
89½ defendants was and is without authority of law and void for that the complainant company is a citizen and resident of the State of New York and that neither of these answering defendants are citizens or residents of the State of Nebraska, nor of the District of Nebraska within which this suit is brought. And in this connection further say that the defendant E. Hyde Rust, described in the Bill of Complaint

as suspended Receiver, is a citizen and resident of the State of New Jersey and that he has been suspended and removed from his said trust as receiver, and is not in possession of any of the property in controversy, and is neither a proper or necessary party defendant; and that Alonzo B. Hunt described as Temporary Receiver, is only an officer and representative of this Court and is not a necessary or proper party to this proceeding; and that the controversy herein is one in which neither the complainant nor defendants are citizens or residents of the District in which the suit is brought and that the matters in controversy in this suit are not auxiliary to nor in any manner dependent upon or connected with any prior proceeding in this Court relating to the property in controversy. All which said matters and things have heretofore been presented to this Court in the form of a Plea to the Jurisdiction of this Court to hear and determine this case, and which said plea having been overruled by the Court and these defendants then desiring and still desiring to reserve and preserve to each of them, all manner of benefit and exception to the said order of Court overruling said plea to the jurisdiction, make this their said answer under protest and obedient to the order of the Court directing that they answer to the merits, [mot] meaning or intending hereby to waive any or singular of the objections to the jurisdiction of the Court hereinbefore set forth.

2. These defendants jointly and severally represent that prior to the 20th day of May, 1880, the City of Omaha, a municipality of the State of Nebraska, desiring to construct
90 or to cause to be constructed a system of water works in the City of Omaha, employed one J. D. Cook to report to the City Council of the City of Omaha a plan for the construction of a system of water works in the said City, and that said J. D. Cook being a skilled hydraulic engineer did report to the said City Council of the City of Omaha a plan for the construction of such a system of water works, said report being found printed and published by the City of Omaha in a book entitled "Charter and Ordinances of the City of Omaha" on pages 584-6, inclusive.

That said report was filed in the office of the City Clerk of the City of Omaha on the 25th day of May 1880, and was afterward approved by the City Council of the City of Omaha on the 18th day of June, 1880, and is set forth at large in said book entitled "Charter and Ordinance of the City of Omaha" at pages 576--593, inclusive.

That afterward on the 31st day of May, 1880, the said J. D. Cook filed an appendix to his said report, which said appendix

may be found on pages 594-595 of said book above referred to, and which said appendix was approved by the City Council on the 8th day of June, 1880.

3 These answering defendants further say that afterward on the 11th day of June, 1880, the City Council of the City of Omaha passed an ordinance which was on the same day approved by the Mayor of the said city, being Ordinance No. 423, entitled "An Ordinance to authorize, procure and construct a system of water works in the City of Omaha, Nebraska." In section 1 of said Ordinance it is provided that any person, company, corporation or association who shall erect, construct and maintain water works of the magnitude and character therein described and as more fully and at large appears in the said report and appendix of the said J. D. Cook for the purpose of supplying the said City and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes shall have the right of way along, upon and under the public streets of the said city for water
91 mains, pipes and fire hydrants during the time such person, company, corporation or association shall maintain and operate such system of water works, but upon the terms and conditions in the ordinance described.

Section 3 of said Ordinance sets forth the pumping capacity of such system of water works, and also the capacity of the water reservoirs to be constructed in connection therewith.

Section 4 of said ordinance provides the size, length and capacity of the water mains, subject to inspection and approved by the City of Omaha.

Section Six of said Ordinance provides for the location and placing of fire hydrants upon and along the streets of said city for the purposes of fire protection, subject to such changes and modifications as the City Council of said City shall direct as to location.

Section 7 of the ordinance provides for the furnishing of [of] a supply of water adequate to the wants and use of the public and for certain sanitary purposes therein set forth.

Section 10 of said Ordinance fixes a maximum charge to be made for the consumption of water for the various purposes and uses therein set forth.

4. That afterward on the 14th day of July, 1880, the City Council of the City of Omaha, passed an ordinance No. 430 which was approved by, the Mayor July 15th, 1880, making certain amendments to said ordinance No. 423 hereinbefore mentioned.

In Section 12 of said ordinance No. 430 it is provided that the City Clerk of the City of Omaha, should advertise for sealed proposals for furnishing the City of Omaha with water for fire protection and for public use of the term of twenty-five (25) Years, according to the provisions of said ordinance, and further provides that the bids received shall specify the price per hydrant per year to be paid therefor by the City of Omaha as in said ordinances and in said report of J. D. Cook provided, and that said bids should also be accompanied
92 by an acceptance of the provisions of said ordinances in the event the contract for the supply of water for the public, and fire protection, should be awarded.

5. In compliance with said advertisement for sealed proposals one Sidney E. Locke, made a bid for the construction of a system of water works, which was in terms as follows:

"Proposal for the Construction and Maintenance of "Water Works in the City of Omaha, State of Nebraska.

"To the Hon., the City Council of the City of Omaha—

"The undersigned hereby proposes to erect, construct and maintain water works in the City of Omaha, for furnishing the City of Omaha, Nebraska, with water for fire protection and public use, for the term of Twenty-five (25) years from the time of the completion of said works as fixed by an Ordinance No. 423, passed and adopted by your honorable body June 11th, 1880, and another Ordinance Amendatory thereof No. 430, passed and adopted, July 14th, 1880, and as required by the details and specifications in said ordinances set forth and referred to.

"The undersigned further and in addition to the foregoing and in further compliance with the requirements and specifications in said ordinance set forth or referred to, propose to so erect, or construct said water works as to furnish water through not less than two hundred and fifty hydrants, as specified, and to so furnish said water so as above stated at the rate of eighty-four (84) Dollars, per year per hydrant, and further propose to erect and furnish water through, such intermediate hydrants, in addition to the number first above given, as may by the provisions of said ordinances and in accordance with the report of J. D. Cook therein referred to, be further called for or required, at a rate of ten dollars ($10) per year per hydrant.

"The undersigned further proposes, in case hydrants
93 in addition to the number and [quamity] hereinbefore specifi-d shall during the time provided for the main-

tenance of said water works, be required on new mains, to erect, construct, maintain and furnish water through the same at the time or times and in the manner by said ordinance or the report of said Cook provided, at a rate of sixty Dollars ($60) per year per hydrant.

"The undersigned further proposes and states that the water so by the proposed works to be furnished shall be for the uses of the kind and quantity, and at rates not to exceed those by said ordinance fixed, determined, or referred to, except as specified herein in connection with hydrant use;

"This proposal is hereby accompanied by a bond duly executed in the sum of ($25,000.00) dollars as required.

The conditions and specifications of said ordinance are hereby accepted in case award of contract for said Works is made to the person submitting this proposal.

S. E. LOCKE.

Dated Omaha, Neb. July 20th, 1880.

Which said proposal was accepted by the City of Omaha, and afterwards on the 20th day of July, 1880, a written contract was entered into between the said Sidney E. Locke and the City of Omaha for the construction of system of Water Works, which said contract made reference to the said report of the said J. D. Cooke, and to said Ordinances No. 423 and 430, and to the advertisement for sealed bids which was made by the City Clerk pursuant to said Ordinances, which said contract was in words [—] figures as follows:

"WATER WORKS CONTRACT."

"This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th day of July A. D. 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, Witnesseth:

"Whereas, the City of Omaha, did on the 11th day of
94 June, A. D. 1880, pass its certain ordinance, No. 423, entitled An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, and did on the 14th day of July A. D. 1880, pass its certain ordinance No. 430, entitled "An Ordinance to amend Sections (3), Six (6), and Twelve (12), of Ordinance 423 entitled An Ordinance to authorize and procure the construction and [and] maintenance of water works in the of Omaha, state of Nebraska, and

"Whereas, the City Council of said City of Omaha did receive from J. D. Cook, engineer, on the 25th day of May, A. D.

1880, the appendix to said report referred to in Section One (1) of said Ordinance No. 423, and did on the 8th day of June, 1880, adopt and approve said report and appendix; and

Whereas, the said City of Omaha did in compliance with the provisions of the said Ordinance, advertise from the 16th day of July, A. D. 1880, for sealed proposals for furnishing the City of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of this work, through two hundred and fifty hydrants, of the character and l-cations mentioned in the Ordinances Nos. 423 and 430, and said report of J. D. Cook, engineer, as approved; and

Whereas, the said City Council of the City of Omaha did, on said 20th day of July, A. D. 1880, accept said proposal of said Sidney E. Locke, did award said contract to him and did order that the said contract should be formally made by the Mayor of said City of Omaha, acting in its behalf.

Therefore, it is hereby contracted and agreed by and between said parties as follows:

In compliance with said ordinances Nos. 423 and 430 the said report of the said J. D. Cook, engineer, and the appendix thereto as approved by the said city Council, said advertisement, proposal and accepting thereof and awarding of said contract (all of which are herein recited as being understood to be parts of this Contract) the said Sidney E. Locke, party
95 of the second part, contracts and agrees with said party of the first part, to erect, construct and maintain said water works in the City of Omaha, and to furnish the city of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works, as fixed by said ordinances Nos. 423 and 430 and by said report of said J. D. Cook, as approved by said City Council. Said party of the second part further agrees to furnish said water through not less than two hundred and fifty hydrants of the character and as located and placed in said ordinances, and approved report, at the rate of Eighty-four Dollars ($84) per year per hydrant, and to furnish said water through such intermediate hydrants, in addition to the number first given, as may by the provisions of said ordinances and in accordance with said approved report (be further called for or required, at the rate of $10.) Dollars per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified shall, during the said term of twenty-five years, be required on new mains, to erect, construct and maintain said new mains at the rate of Sixty (60) Dollars per year per hydrant.

"And in consideration of the said agreement of the said Sidney E. Locke, the said party of the first part agrees to pay for said hydrant water supply at the rates per hydrant per year above specified. The said payment to be made by warrants drawn upon the first day of July and the first day of January of each year and every year of said term upon the treasury of said City; the payment for the water from each hydrant to commence when it is actually ready for use and the City Clerk notified thereof, and the pay thereof shall cease during any time that said hydrant shall be out of repair or unfit for use. This contract shall take force and effect only upon its approval by the City Council of the City of Omaha.

In Testimony Whereof, we have hereunto set our hands at Omaha, Nebraska, the date first above written.

(Signed,) THE CITY OF OMAHA,
By C. S. CHASE, Mayor.
96 SIDNEY E. LOCKE,

Signed in presence of
CHAS. F. MANDERSON
C. J. WESTERDAHL.

Approved by the City Council, July 20, 1880.

(Signed) JAMES E. BOYD,
Pres't City Council.

Attest:
J. F. McCARTNEY, City Clerk.
[Seal of the City of Omaha]

That afterwards on the 26th day of July, 1880, the said Sidney E. Locke for a good and valuable consideration, did assign, sell, transfer and set over unto "The City Water Works Company of Omaha, a corporation organized under and existing under and by virtue of the laws of the State of Nebraska, said contract for the construction, operation, control and maintenance of water Works in the City of Omaha, with all the rights, privileges, immunities, profits, duties and obligations that he, the said Sidney E. Locke did have thereunder, to the same extent in each and every part as if said contract had been made with the City Water Works Company of Omaha originally, and not with said Sidney E. Locke."

6. That afterward the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, pretended to purchase of and from the said City Water Works Company of Omaha [of Omaha] the said water works plant in

the City of Omaha, including the real estate connected with the operation of the same, by means of which the city of Omaha and its inhabitants were and are supplied with water for fire and other purposes and thereby pretended to assume and must be held to assume and to be bound by all the terms and conditions of said contract between the said City of Omaha and the said Sidney E. Locke, and to maintain and operate said system of water works for the use and benefit of the City of Omaha in the same manner and to the same extent as the said Sidney E. Locke by his said contract was bounden to do.

97 That it was well known and understood between all the parties thereto that the chief object of the City of Omaha in taking the respective steps aforesaid looking towards the construction of said system of water works, was to supply the city of Omaha with water for fire protection and for public and domestic use in the same manner and to a like extent as if the said City of Omaha had in its own right and at its own expense constructed and owned said system of water works, and all of which facts the complainant company and all the singular of the owners and holders of the series of bonds in the bill of complaint set forth were bounden to know.

7. That the defendant the American Water Works Company of Illinois was not by law duly authorized on or about the first day of July, 1887, or at any time to make and execute the mortgage in the Bill of Complaint described upon the said system of water works and was not by law duly authorized to secure the said issue or series of bonds in the Bill of Complaint described by any mortgage or deed of trust upon the said system of water works in the City of Omaha.

That the American Water Works Company of Illinois, the mortgagor Company herein, was not under and by virtue of its articles of incorporation authorized or empowered to make or execute said mortgage upon the said water plant nor was said company authorized thereunto under and by virtue of the laws of the State of Illinois nor under nor by virtue of the laws of the State of Nebraska where said property is situate, to make and execute said mortgage upon said property, and all of which said facts the complainant Company as well as all and singular of the owners and holders of said bonds must be held bounden to at all times have known.

That said franchise, privilege and easement granted by the City of Omaha to the said Sidney E. Locke was a personal privilege granted by the City of Omaha to be used only for the use and benefit of the City of Omaha, and subject to its control,

and so the defendant companies [nust] be held to have ac-
98 cepted the same, and that no privilege, right or author-
ity was ever granted or intended to be granted by the City of Omaha to the said Sidney E. Locke or his assigns to mortgage, encumber or other wise dispose of said franchise, or of any of the property constituting a part of said system of water works or incidental or necessary thereto, pertaining to the maintenance and operation of said system of water works, or to do any other or manner of thing that would tend to take away or deprive them of their power to maintain and operate said system of water works for the use and benefit of the City of Omaha, as under said ordinances and said contract with Sidney E. Locke was and is provided.

These defendants further answering say that all the property real and personal, as well also the privileges, franchises and easements intended to be conveyed by said mortgage were and are necessary to the use and enjoyment of the person or company operating said water plant, and were and are necessary to such company to enable it to maintain said system of water works and to supply the said City of Omaha with water for domestic uses and for fire protection, all of which matters and things were well known to the complainant company at the time of the pretended execution of said mortgage and were also so known to the persons becoming the owners and holders of the bonds pretended to be secured thereby.

That it was well known to the Complainant Company as well as to the said bond holders who purchased the bonds pretended to be secured by said mortgage, that to enforce said mortgage by decree of foreclosure and sale of said property or by the taking possession of said property by the said Trustee under and by virtue of said mortgage, would deprive the defendant companies of the power to maintain and operate said water plant, and would render said defendant companies powerless to fulfill the obligations they assumed to the City of Omaha and would thereby destroy and take from the City of Omaha the
right which it had secured to itself by said contract with
99 Sidney E. Locke, to have its inhabitants supplied with
water for domestic use, and the municipality to be supplied with water for fire protection and other purposes.

Whereby and by reason whereof said companies were without authority of law to make said mortgages and the same were and are, illegal and void.

These defendants further answering say that by Section 11 of said ordinance 423 which is made a part of said contract, with the water Company, it is provided;—

"In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works

under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for [immedi4te] and constant use, in accordance with the requirements of this ordinance, (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of just compensation therefor, to be ascertained as provided in Section 14 of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation.

That under and by virtue of the provisions of said Section the City of Omaha had and has a material interest in said property of which it could not and can not be divested by either a mortgage or sale under foreclosure, and further that the making of said trust deed was and is in violation of the provisions of said section and that a foreclosure of said mortgage and sale of the water plant would deprive the defendant companies of the power of complying with its duties and obligations to the City of Omaha, which would result in a for-
100 feiture of said property and all the rights, privileges and immunities granted to the defendant companies, and re-vest the ownership, possession, control and management of said system of water works, in the City of Omaha, and by reason whereof said mortgages were and are, illegal and void, and were and are against public policy.

8. These defendants further answering say that while the said pretended mortgage purports and pretends to cover all the property and assets of every kind and nature of the mortgagor company, and also its privileges, franchises, easements and choses in action no such extensive authority was ever undertaken or pretended to be granted by the said mortgagor company to its said officers who assumed to execute the said mortgage, and that the said J. R. Custer, assuming to act as President of the said Mortgagor Company, and the said Joseph A. Griffin, assuming to act as the Secretary of said mortgagor Company in the execution of said mortgage, acted without authority from said Company in the making and the executing of said mortgage in this, that they were never authorized to execute this particular instrument; that all the authority possessed by the said Custer as President and the said Griffin as Secretary was such powers and authority as were vested in

them as such officers under the articles of incorporation and the by-laws of the mortgagor company, and by the minutes of the proceedings of its Board of Directory, and that nowhere in their said articles of incorporation, or By Laws or minutes of proceedings of its Board of Directory was there authority granted to the said persons to execute the instrument in the Bill of Complaint set out.

Defendants further say that each and singular of the averments hereinbefore set forth touching the infirmities existing in said mortgage equally apply in truth and in fact to the said supplemental mortgage in the Bill of Complaint described.

9. These defendants further answering deny that default was made by the mortgagor Company in the payment of coupons, as set forth in paragraph Twenty (20) of the Bill
101 of Complaint, and in that connection further say that the coupons maturing January 1st, 1892, amounted to the sum of $98,000.00 and of which sum only $41,279.00 are outstanding and of this sum $8,000 are owned and held by the Omaha National Bank, and were purchased and are held by the Omaha National Bank for the purpose of avoiding a forfeiture under the said mortgage, and that of said coupons $18,275. are owned by the United Water Works Company, and are held by it for the purpose of avoiding a forfeiture under said mortgage, thus leaving but a sum of $15,000. of unpaid coupons maturing January 1st, 1892.

Of the $98,000. of coupons maturing July 1st, 1892, there are only $48,000. outstanding, and of which amount $45,000, are held and owned by persons not desiring either a default or a foreclosure under said mortgage.

Of the coupons maturing January 1st, 1893, only $22,500. are outstanding, and of which amount $21,290. or nearly the whole amount, are controlled by C. H. Venner, and who is likewise opposed to the said foreclosure.

Of the Coupons maturing July 1st, 1893, $32,000. have been purchased and are now controlled by persons who have waived default and are opposed to foreclosure.

That the whole amount of outstanding unpaid coupons is $209,775. prior to January 1st, 1894, and that the greater portion of which are held by persons who are opposed to a foreclosure of said mortgage and have not desired any default to be declared thereon, and that the whole amount of overdue coupons controlled by the Farmer's Loan & Trust Company, Complainant, is less than one-half of all the over-due coupons outstanding.

In this connection these defendants further answering say that the complainant company as trustee has never made any demand upon the mortgagor company for the payment of any interest coupons, and that no demand has been made upon said trustee company by the holders of a majority of said
102 coupons to declare a forfeiture or to foreclose said mortgage. In this connection these defendants further answering say that the said water plant at Omaha has at all times been earning sufficient money to pay its operating expenses and accruing interest and would have paid all of said coupons upon maturity thereof if it had been permitted to manage its said property and in this connection further say that there is sufficient money in the hands of this Court belonging to the defendant companies to pay and take up all the coupons maturing before the first of January, 1894, which are in the hands or under the control of the complainant company, and sufficient to pay and take up the coupons held by persons now insisting upon a foreclosure.

10. These defendants further answering say that the defendant company having dissensions in its Board of Directory, certain persons, being desirous of obtaining control of the property caused to be instituted certain legal proceedings in this Court and also in the Court of Chancery of the State of New Jersey, for the purpose of preventing the application of the earnings of the water Company to the payment of said coupons, with the ultimate aim of bringing about a default in the payment of such coupons so that a foreclosure might be brought about, and by the means of such foreclosure to enable certain of the stockholders, and certain of the holders of the bonds to obtain the title to and possession of the water plant, to the exclusion of a large number of other stockholders and bond holders equally interested in the preservation of the water plant and equally interested in the prevention of a foreclosure.

11. These defendants further say that as a part of said scheme to bring about the present attempted foreclosure, a committee, was organized by certain dissatisfied stockholders, and bond-holders to obtain the control of certain of the bonds and coupons with a view of this foreclosure proceeding. That said committee was and is composed of seven persons, of whom Rosewell G. Ralston the President of the complainant
103 Company, is one. That said committee devised and issued and caused to be circulated among the bond holders certain circulars requesting them to surrender their bonds and coupons to said committee and requiring the owners and holders of said bonds and coupons to submit to an assessment of a

considerable sum of money to be paid into the hands of said committee, under the pretense or claim of raising a fund to pay the expenses of protecting the interests of said bondholders, and which said circulars contained a further I-nuendo or threat to the effect that if said bondholders submitted their bonds and coupons to said committee, or to the complainant company that they would forfeit their rights under the said mortgage, and that under and by virtue of said proceedings in-uendoes and threats the complainant company was enabled to obtain possession or control of certain of said bonds and certain of said unpaid coupons to the limited amount herein before set forth, and that the complainant company when called upon by certain of the stockholders and bondholders to disclose what persons, if any, being bondholders, had requested of the complainant company to declare a default and to bring a foreclosure proceeding, declined to make such disclosure of what persons if any had so requested said default or said foreclosure. Wherefore defendants charge upon information and belief that the declaration of default, if any has been made by the complainant company, and said determination of said complainant company to file its bill of foreclosure, has not been done in the interest of the bondholders, but has been done in the interest and at the solicitation of the said committee above referred to, and which was organized as these defendants are informed and believe to secure a personal advantage to themselves or those represented by them under their procurement as aforesaid, and to the disadvantage and against the wish of a majority of the holders of the bonds and Coupons.

104 Wherefore the defendants charge that this foreclosure proceeding is unjust and inequitable and is contrary to, and unwarranted by the provisions and stipulations in the said Mortgages in that behalf.

12. These defendants further answering deny that E. Hyde Rust is in possession of any of the property or franchises covered by the said mortgage, but upon the contrary aver that under and by virtue of an order issued out of this Court said E. Hyde Rust has been removed as receiver of any of said property, and that said E. Hyde Rust has not been exercising as such receiver any control over said property for a long time prior to the filing of the bill of complaint herein. And these defendants deny that the said E. Hyde [E.] Rust has any right to the possession or control of any part of the property covered by said mortgage under and by virtue of any order whatsoever issuing out of said Court of Chancery in the State of New Jersey or under and by virtue of any order issued out

of this Court in the suit of the Denver City Water Works Company et al. vs. the American Water Works Company et al., referred to in any of the several divisions of paragraph twenty (20) of the Bill of Complaint.

13. These defendants further answering say that if they had been permitted and were now permitted without the interference of the complainant company and of said committee in the interest of whom the complainant company is acting, to receive use and apply the moneys on hand and the revenues and receipts from said water plant to the payment and discharge of maturing coupons, these defendants could at all times and could now pay, discharge and take up all outstanding coupons and preserve, maintain and operate said water plant for the use and benefit of the City of Omaha as in said Contract between the City of Omaha and Sidney E. Locke is provided, and further say that such a preservation of the said water plant by the defendant companies would best subserve the interests of all concerned. Wherefore defendants charge and aver that such orders and decrees in that
105 behalf should be entered herein as would provide for the taking up and discharge of said coupons, and as should preserve the said water plant to the defendant companies, and in that behalf that the prayer for the foreclosure of the said mortgage should be denied.

14: And the said defendants further answering deny that the said complainant is entitled to the relief or any part thereof in the said complaint demanded. And these defendants pray the same advantage of this their joint and several answer as if they had severally pleaded or demurred to the said bill of complaint.

And these defendants pray leave to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

THE AMERICAN WATER WORKS COMPANY (OF ILLINOIS) AND AMERICAN WATER WORKS COMPANY (OF NEW JERSEY)

By JNO. L. WEBSTER,
their Solicitor.

JNO. L. WEBSTER,
A. J. LUNT,
Of Counsel.

Upon the back of said Answer appear endorsements in the words and figures following, to-wit:

Doc. Q. No. 96. U. S. Circuit Court, District of Nebraska. The Farmer's Loan & Trust Co., Plaintiff, vs. The American

Water Works Co. Defendant. Answer of The American Water Works Co. (of Illinois) The American Water Works Co. (of New Jersey.) Filed Apr. 30, 1894. Elmer D. Frank, Clerk. Jno. L. Webster, Attorney for Defts.

106 Thereupon afterwards, to-wit:—On the 10th day of May, 1894, a Replication was filed in said case, which said Replication is in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Farmer's Loan and Trust Company,
In Equity. 96 Q. vs.
The American Water Works Company, et al.

The replication of The Farmer's Loan and Trust company (of New York) plaintiff, to the answer of The American Water Works Company (of Illinois) & The American Water Works Company of New Jersey defendants.

The repliant saving and reserving unto itself now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said Answer, for replication thereunto, say that they will aver, maintain and prove the said Bill of Complaint to be true, certain and sufficient in the law to be answered unto, and that the said Answer of the said defendants, uncertain, untrue and insufficient to be replied unto by the repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things the repliant, and will be ready to [sver], maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by the said Bill of Complaint it has already prayed.

JAMES P. ENGLISH,
Solicitor for Plaintiff.

Upon the back of said Replication appear endorsements in the words and figures following, to-wit:

107 No. 96 Q. U. S. Circuit Court, District of Nebraska, in Equity. Farmer's Loan & Trust Company vs. American Water Works Co., et al. Replication. Filed May 10, 1894. Elmer D. Frank, Clerk. J. P. English, solicitor for plaintiff.

Thereupon afterwards, at the May 1894 Term of said Court, on the 17th day of July, 1894, the following proceedings were

had and done in said case as appears of record on folio 57 Journal "T" of said Court, to-wit:

ORDER.

Farmer's Loan & Trust Company, Plaintiff,
96 Q vs.
American Water Works Company, et al. Defendants.

Now on this July 17th. 1894, on the application of E. Hyde Rust, Suspended Receiver of the American Water Works Company (of New Jersey) it is ordered that the said Rust be, and is hereby allowed to file a cross-bill herein, making in said cross-bill, The [Fsrmer's] Loan & Trust Co., The American Water Works Company (of Illinois) and Alonzo B. Hunt, Temporary Receiver of the American Water Works Company (of New Jersey) defendants.

Thereupon afterwards to-wit:—on the 17th day of July, 1894, the Cross-bill of E. Hyde Rust, Suspended Receiver of the American Water Works Company (of New Jersey) was filed in said case, which said Cross-bill is in the words and figures following, to-wit:

108 In the Circuit Court of the United States, within and for the District of Nebraska.

E. Hyde Rust, suspended Receiver of The American Water Works Company (of New Jersey), Complainant,

v.

The Farmer's Loan & Trust Company, The American Water Works Company (of Illinois) and Alonzo B. Hunt, Temporary Receiver of The American Water Works Company (of New Jersey), Defendants.

The Cross-Bill of E. Hyde Rust, Suspended Receiver of the American Water Works Company (of New Jersey).

To the Honorable, the Judges of the Circuit Court of the United States within and for the District of Nebraska.

Humbly complaining, your orator, E. Hyde Rust, Suspended Receiver of the American Water Works Company (of New Jersey), respectfully shows unto your honors, that

1: Your said orator is a resident of the City of Jersey City, in the County of Hudson and State of New Jersey, and a citizen of said State of New Jersey, and is now and during the time of all the transactions hereinafter set forth, ever has been the receiver of The American Water Works Company (of New Jersey) duly appointed and qualified as such as hereinafter more particularly stated, though
109 since July 15th, 1893, the functions of your said orator have, by an order issued in this Honorable court, as

will hereafter more particularly appear, been suspended in the District of Nebraska.

2: That the defendant The American Water Works Company (of Illinois), hereinafter designated the Illinois company, is a corporation duly organized under the laws of the State of Illinois, and having its principal offices and place of business in the City of Chicago, in said State of Illinois; that the defendant, The American Water Works Company (of New Jersey) hereinafter designated the New Jersey company, is a corporation duly organized under the laws of the State of New Jersey, and having its principal office and place of business in the City of Jersey City in said State of New Jersey.

3: That said Illinois company was organized in the State and under the laws of Illinois aforesaid, in the year 1887, with the object and purpose, and with the power granted in its charter, to build, keep and operate water works to supply water to cities and towns, villages, municipal and other corporations, to acquire by purchase, lease or otherwise, such works and operate the same, and to deal in stocks and bonds of other corporations and associations organized for a similar purpose, the said business to be carried on in said State of Illinois and elsewhere as the said Illinois Company elect.

4: The said New Jersey Company was organized in the State and under the laws of New Jersey, aforesaid, in the year 1891, with the same object and purpose, and [possession] like power under its articles of association to that conferred as hereinbefore set out, upon the said Illinois Company, with the power to carry on its said business in the State of New Jersey or elsewhere as it, the said New Jersey Company, might elect.

110 5: In the Spring of 1891, said Illinois Company transferred to the New Jersey Company, all of its plant, mains, pipes, reservoirs, engines and other appliances incident thereto, in the cities of Omaha and South Omaha, and in the town of Florence, together with the franchises from said cities and said town and the benefit and advantage of said contracts with the various inhabitants thereof, subject to all the undertakings and obligations of said Illinois Company, and said New Jersey Company entered upon the execution of said contracts, and has continued to perform the stipulations therein contained, on the part of said Illinois Company to be kept and performed, and thereupon said Illinois company quit the possession and dominion of said property, and has not since resumed or carried on the same.

6: In the winter of 1891-2, divers controversies arose between certain of the stockholders and directors of said New

Jersey Comp-ny on the one hand, and others of its stockholders and directors on the other hand when in January 1892, a bill was exhibited in this Honorable Court, same being Doc. P. No. 45 of the records thereof, wherein the Complainant, The Denver City Water Works Company, et al. suing for themselves and all other stockholders who should join with them, alleged divers matters of complaint against said Illinois company and the other defendants therein, and that said New Jersey Company was without a proper governing body, and prayed this Honorable Court to take charge of the property of said New Jersey company, and to administer the same, and cause the same to be sold and the proceeds applied, under the order of this Court, to the payment of its floating indebtedness, and the balance distributed among its stockholders; that a receiver might be appointed of the property within this district, to manage, control and preserve the same, under the orders of this Court, with the usual powers of receivers in such cases, taking pos-
111 session of said property and operating the same, receiving the income thereof, and also enjoining the defendant in said bill from transferring, assigning or setting over any property of said New Jersey Company to said Illinois Company or any other person or persons whomsoever. And thereafter, after answer being filed and a hearing thereon, this Honorable Court on February 11th 1892, made its certain order wherein it found that said New Jersey Company was without a legally constituted governing body; that its assets and property were in danger of being materially injured and depreciated and lost to its stockholders and creditors by the course of said defendants as charged in said bill, and that the appointment of a receiver would be to the best interest of the public, the creditors and stockholders, whereupon this Honorable Court ordered that the defendants Ellis L. Bierbower and Alonzo B. Hunt be appointed receivers of the assets and property of said New Jersey Company in this District, and that the defendants in said bill, deliver the same and all thereof to said receivers, who were thereby authorized jointly to take possession of said property [amd] all thereof, and manage and conduct the business of said company, paying into the registry of this Court, all moneys, which from time to time, should come into their hands.

7: That said receivers so appointed duly qualified and entered upon the discharge of their duties, and continued in the same until the time and under the circumstances hereinafter specifically set forth, that is to say, in the Court of Chancery of New Jersey, on the 8th day of April, 1892, under and in pursuance of the provisions of an act of the legislature of New Jersey, entitled "An Act Concerning Corporations," approved April 7th, 1875, and the acts supplementary thereto and amend-

atory thereof, under which said laws said New Jersey
112 company was incorporated, an action was instituted by certain of the stockholders and creditors of said Company, for and on behalf of themselves and all other creditors and stockholders of said company, for the purpose of enjoining and forbidding said company, its officers and agents, from exercising the franchises and privileges of their charter, and carrying on the business of said Company, and appointing a receiver to take charge of and administer the affairs of said Company, and in order that said Company might be decreed to be insolvent and that the receiver might be appointed according to the form of said statute, for the purpose of paying the rents and winding up the affairs of said Company.

8: That in said action so pending in said Court of Chancery of New Jersey, said New Jersey company and the creditors and stockholders thereof, being duly served with summons to be before said Court, and said Court having jurisdiction thereof, on the 20th day of July, 1892, ordered that an injunction issue against said company according to the prayer of said bill in said suit so filed, and it did further order that your orator E. Hyde Rust of Jersey City, New Jersey, be and he was thereby appointed receiver of said Company "with full power to demand, sue for, collect and receive and take into his possession, all goods, chattels, rights and credits, moneys and effects, lands and tenements, books papers choses in action, bills, notes and property of every description belonging to said New Jersey Company, and to perform all the duties imposed upon him as required by law, and especially by an act entitled "An Act Concerning Corporations, approved April 7th 1875, and the acts supplementary thereto and amendatory thereof," and in said action so pending in said Court of Chancery of New Jersey the proceedings were had and complaint made, and the remedies asked and obtained, as the petition and the exhibits
thereto filed in said Court on August 24th 1892, by your
113 orator, to which reference is hereby made, wherein and whereby this Honorable Court was informed of your orator's appointment as receiver of said Company, and that your orator had duly qualified, and further informed this Court of your orator's rights, powers, and authority under the statutes aforesaid, and asked that your orator's appointment be ratified and confirmed by this Court, and that the property of said company in the State of Nebraska, and then in the custody of this Court, be ordered transferred and delivered to your orator as such receiver.

9: And your orator shows unto this Honorable court that on the filing of your orator's petition and the presentation thereof on August 24th 1892, it was ordered that all the parties

thereto, complainants and defendants, as well also as that Ellis L. Bierbower and Alonzo B. Hunt, the local receivers then in charge of and holding the property of said New Jersey Company situated in the State of Nebraska, be and they were by this Honorable Court ordered, each and all of them, to show cause, if any they had, on or before September 1892, why your orator's petition hereinbefore referred to, should not be granted as prayed, and said property turned over to your orator as receiver of the Court of Chancery of New Jersey. The order so made by this Honorable Court upon said parties and local receivers, was duly served on each and every of them.

10. On the day appointed by this Honorable Court for said parties to show cause, the hearing of said application was continued, and thereafter from time to time, until the 23rd day of September, 1892, when said application having been fully heard, this Honorable Court did on said hearing, grant the same as therein prayed, and find and adjudge that your orator had been appointed and duly qualified as receiver of said New Jersey Company and that as such orator had "full power and authority to demand, sue for, collect and take
114 into his possession all the goods and chattels rights and credits moneys and effects, lands and tenements books papers, choses in action, bills, notes and property of every description belonging to said The American Water Works Company (of New Jersey) and to perform all the duties imposed upon him by law, especially by an act entitled "An Act Concerning Corporations," approved April 7th, 1875, and the acts supplementary thereto and amendatory thereof." And this honorable Court did by its said order decree and direct that your orator be recognized as receiver of said New Jersey Company, and entitle to have and exercise all the rights, powers and privileges hereinbefore set forth, and did further direct that the local receivers in charge of said property each and both of them, should turn over to your orator as receiver aforesaid, all the assets and property of every description of said New Jersey Company, then in their possession or under their control.

11. That thereafter your orator duly qualified in compliance with the order of this Court made on September 23rd 1892, as receiver of said New Jersey Company, and on the 18th day of October, 1892, was by the local receivers aforesaid, given full and exclusive possession and control of all the assets of said New Jersey Company in the District of Nebraska, including the water works plant and all apparatus thereto which were supplying the cities of Omaha and South Omaha, and the town of Florence and vicinity with water. And your orator in his

capacity as receiver of said Company continued to have and hold the exclusive possession and control of the entire Water Works plant of the said The American Water Works Company in the District of Nebraska, until the 15th day of July, 1893, a period of about ten months, when, upon the said 15th day of July 1893, by an order entered by this Honorable
115 Court in the aforesaid cause docket P. Folio 35, your orator was suspended as receiver of the Omaha plant of the said The American Water Works Company, pending proceedings for your orator's removal, for inasmuch as on July 6th The United Water Works Company had made application for the removal of your said orator as receiver on account of alleged "extravagance, waste, unfairness, and partially in the disbursement of funds, for incompetency and other reasons in the application more particularly set forth." The said application to remove your orator is, in the said cause wherein it was made, still pending and is yet undisposed of, but since said July 15th 1893, in consequence of the said order of suspension, your said orator has not been in the possession or control of any of the property of the said Water Works Company in the District of Nebraska, but upon the 15th day of July 1893, this Honorable Court in said cause Docket P. Folio 35, at the same time that it entered the order suspending your orator, made an order appointing Alonzo B. Hunt, one of the defendants in this cause as temporary receiver, and the said Hunt immediately qualified as such temporary receiver and took charge of all the property of said water Works plant in the District of Nebraska, and continued to hold the same and receive all its income, revenues and profits until in the month of October 1893, when, upon the 9th day thereof the defendant herein the Farmer's Loan & Trust Company exhibited its bill in this cause in this Court, wherein said Farmer's Loan & Trust Co. alleged the execution and delivery to it of two certain mortgages upon the plant of said Omaha property in the District of Nebraska, one for $400,000.00 and the other for $4,000,000.00 of which latter bonds to the extent of $3,600,000.00 had been issued, and further alleged that there had been default in the payment of interest coupons upon said mortgages and that the holders of said coupons, or a portion thereof, as provided in said mortgages had requested the said Farmers' Loan & Trust Company to institute foreclosure proceedings, and in said bill a
116 foreclosure of said property was asked as is usual in cases of foreclosure and thereupon, upon the filing of said bill, and at the request and upon the motion of the said complainant therein this Honorable Court, on October 13th, 1893, appointed the defendants Ellis L. Bierbower and Alonzo B. Hunt Receivers of

the property of said New Jersey Company in the District of Nebraska, and said Bierbower and Hunt then and there immediately qualified as such and ever since have continued to act and are now acting as such receivers of said property in the District of Nebraska, receiving all the income revenue and profits of said water works property from whatever source derived.

12. That during the time your orator had possession, control and the operation of said Water Works property in the District of Nebraska, from September 23rd, 1892, to July 15th, 1893, your orator collected from the income and revenue of said Omaha plant the sum total of $258,830.26, and that during the same time he made cash disbursements on account of the expenses of operating said plant, and for the purpose of paying interest coupons upon the bonds secured by the mortgages given to the Farmer's Loan & Trust Company the sum total of $243,122.64, and that at the time of his suspension on said July 15th 1893, your orator had a balance of cash on hands collected from the income and revenues of said Omaha plant, amounting to $15,707.62; that of said sum $2390.78 was deposited to your orator's credit as receiver in the Hudson County National Bank, at Jersey City, New Jersey, and the balance thereof, the sum of $11,769.04 was deposited to the credit of your orator as receiver in the United States National Bank, at Omaha, Nebraska, and the remainder, to-wit:—$1547.80 was in the custody of the clerical force in the office of your orator in the City of Omaha, Nebraska; that all of said money
117 except the said $2390.78, to-wit:—$13,316.84 was on said July 15th 1893, ordered to be turned over to said Hunt, temporary receiver so as aforesaid appointed, or to be paid into Court, and of the $243,122.64 disbursed by your orator, a large amount, your orator does not now know exactly how much was paid by your orator on interest coupons on the bonds secured by said mortgages to complainant, and about all of said interest was paid directly to the defendant, The Farmer's Loan & Trust Company.

13: And your orator says that for the six months beginning January 1st, 1893, and ending July 1st, 1893, your orator, as receiver, through the water works plant at Omaha, had furnished water to said City, under the contract existing between your orator and said Company on the one part and said City on the other part therefor, at the agreed price and value of $40,241.72; that said sum was payable on July 1st 1893, for said water so furnished during said six months; that all of said work and services had been rendered and performed by your orator during said period, whereby he was entitled to re-

ceive said aggregate of $40,241.72 from said City on July 1st 1893; that while the bills had been presented by your orator to the Common Council of said City for said sum, said council had not made an order appropriating said sum or directing a warrant to be drawn on the City Treasurer therefor; that thereafter and on the 6th day of July, 1893, this Honorable Court directed that said City of Omaha should pay said sum of $40,241.72, into the registry of this Honorable Court, and the said money was by said City of Omaha paid into the registry of this Court in pursuance to said order, in the sums as follows, that is to say, on the 14th day of July, 1893, the said City paid into the registry of this Court the sum of $37,241.72, and on the 20th day of July, 1893, the said City paid into the registry of this Court the further sum of $3,000.00, making the total sum of $40,241.72; that by reason of the orders aforesaid, this Honorable Court had possession and control of the sum total of $53,558.56, of which $13,316.84 had been received and
118 was actually in the possession of your orator as receiver aforesaid, at the date of his said suspension, and $40,241.72 of which had been fully earned by your orator during his said receivership, and was then due and payable to him as such receiver.

14: That of the said total of $53,558.56 so taken and withheld from your orator by this Honorable Court, there was on the dates hereinafter named, the amounts paid and disposed of by the direction of this Honorable Court, on the accounts as follows that is to say, on

1893.

July 17, To E. P. Allis Co. for machinery and material furnished by said E. P. Allis Co. prior to January 1st, 1892, that is to say, previous to the appointment of any receiver herein, on account of an old indebtedness of said American Water Works Co., ... $11,000.

July 17, Out of said funds so paid into this Court in discharge of coupons upon bonds issued by the defendant, The Farmer's Loan & Trust Co. and secured by said mortgages, which said coupons were held by the Omaha National Bank, of Omaha, Nebraska, ... 17,000.00

July 17, Out of said funds so paid into this Court in discharge of coupons upon the bonds issued by the defendant The Farmer's Loan & Trust Co. and secured by said mortgages, which said coupons were by the United Water Works Company, ... 15,000.00

Aug. 3, There was paid out of the registry of this Court directly to said Alonzo B. Hunt Receiver, with instructions to use the same and all thereof in payment of interest coupons on the bonds issued by said defendant the Farmer's Loan & Trust Co., secured by
[119] the mortgages exhibited in its bill herein, of which amount of money, upon information and belief your orator alleges was by said Hunt remitted to the defendant herein, the Farmer's Loan & Trust Co. the sum of $5,241.72

Thus making a total paid of 48,241.72

That of the remainder of said $13,361.84 in. the hands of said Hunt as aforesaid, after the payment of the said Allis Company to-wit:—the sum of $2,316.84, the whole thereof was used by the said Hunt, as your orator alleges upon information and belief, in paying the operating expenses of said water works plant in the City of Omaha, and the charges incident thereto, thus leaving in the registry of this Court of the moneys so as aforesaid earned during the receivership of your orator, the sum of $3,000.00 which said sum of $3000.00 was on July 20th 1893, by the order of this Court, deposited in the Omaha National Bank at Omaha, Nebraska, and a certificate of deposit taken therefor from said bank, payable to the order of the Hon. E. S. Dundy, the Judge of this Court.

15: That in addition to the sums aforesaid, there was earned betwen January 1st, 1893, and July 1st 1893, $2295.00 for water furnished by said Water Works Company to the City of South Omaha, Nebraska, during said period; that said earnings were an asset of your said orator as said receiver; that the same was for hydrant and meter rentals due and owing from the said City of South Omaha, and wherefor the said City of South Omaha had issued its warrants, but which said warrants were not paid, and the said warrants were by the said Hunt received and held, to the amount and value of the said sum of $2295.00 until his appointment as receiver under the said bill exhibited herein on October 9th, 1893; that thereafter the said warrants so as aforesaid
120 received from the said City of South Omaha were turned over to and received by the said defendants herein Ellis L. Bierbower and Alonzo B. Hunt, receivers appointed by this Honorable Court upon the institution of this action for foreclosure, and your said orator alleges that the said receivers in this foreclosure action now have and hold the said warrants so as aforesaid issued by the said City of

South Omaha, the exact amount due and payable thereon and the exact value thereof at the time they were received by the said receivers, your said orator cannot state, but your said orator knows that they were worth their face value, which was and is the sum of $2295.00.

16: And your said orator alleges that on May 7th 1894, there was by this Court, in this cause, an order entered directing that the said sum of $3000.00 so as aforesaid, paid into the registry of this Court, and so as aforesaid, earned during the receivership of your orator, should be turned over to the said Ellis L. Bierbower and Alonzo B. Hunt, and in pursuance of said order, on May 7th, 1894, the said sum of $3000.00 was in fact turned over to and received by said Receivers Ellis L. Bierbower and Alonzo B. Hunt appointed herein on said October 13th 1893. The said moneys that is to say, the warrants issued by the City of South Omaha in the amount aforesaid, and the said sum of $3000.00 your orator alleges are properly credits to the case wherein The Denver City Water Works Company and others are complainants, and The American Water Works Company (of New Jersey) and others are defendants, the same being Docket P Folio 35 of the records of this Court, and the same case in which your orator was recognized as receiver herein, and the said moneys, and all thereof, your said orator alleges are properly, legally and equitably chargeable with all the obligations which accrued and were incurred during the receivership of your orator, and the time that your orator held
121 the control of and operated said property; and the said moneys were transferred by the order of this Court in this cause without any order having been made therefor, in the said cause in Docket P. Folio 35, and without any notice to or consent of any of the parties, either plaintiff or defendant, or otherwise, interested in the said cause Docket P. Folio 35, to the credit of which the said money and warrants properly belonged, and the said order was made by this Honorable Court, as your orator believes and therefore alleges, *sua sponte*, and without the application of any party, privy, or other person therefor.

17: And your orator alleges that all of the debts and obligations of every kind and description incurred by your said orator in the management and operation of said water works property in the City of Omaha, have been paid, except that there has been no final settlement as between your orator and his said solicitors for their compensation, nor has there been any final adjudication and determination of this Honorable Court of the amount due your orator on account of his compensation for services, but with these exceptions there

are [not] other charges or expenses of any kind or description incident to or growing out of the operation and management of the said water works property in the District of Nebraska by your orator, but your orator alleges it to be the fact that from the time that your orator was recognized by this Honorable Court as receiver of said property, and authorized to take possession thereof on the 23rd day of September, 1892, it was necessary for your orator to on divers times and occasions, and in fact almost daily, have consultat-ons and advice with and from attorneys and counsellors at law in order to enable him to discharge the delicate duties imposed upon him by his receivership aforesaid; that at the time your orator came into possession and control of said property, there were divers suits pending against said property which he
122 was charged with the duty of defending and involving large sums of money, and which said suits it was necessary that your orator would employ attorneys and solicitors to look after and defend; that to that end your orator in the business pertaining to the administration of his trust with reference to said Omaha property, did during all of said time, employ one Chas. Offutt a solicitor and counsellor at law in Omaha, Nebraska, and with respect to the general administration of your said orator's trust, did employ the firm of Collins & Corbin, solicitors and counsellors at law in the City of Jersey City, New Jersey, who did act as the counsel and solicitor for your said orator, and did at divers times and occasions render onerous and valuable services to your orator as receiver, which enabled your orator to faithfully and efficiently discharge his duties as such receiver and in order to conserve and preserve the property in his hands, as such, and that in the Court of Chancery of New Jersey, on the 17th day of December, 1892, it was, in the case wherein your said orator was appointed, ordered and directed by said Court of Chancery of New Jersey, that your orator be and he was thereby authorized to draw from the funds in your orator's hands as receiver, $500.00 per month on account of compensation from the date of [yours] orator's appointment on July 20th 1892, until the further order and direction of the Court of Chancery of New Jersey in the matter.

18: That thereafter and on August 1st 1893, your orator exhibited in said Court of Chancery of New Jersey, in the action wherein your orator was originally appointed, your orator's report as such receiver from the date of your orator's appointment on July 20th 1892, to the date of your orator's suspension on July 15th, 1893, inclusive, which said report of your orator had attached thereto, as part thereof, various schedules marked alphabetically from A to I inclusive, and

fully and exactly showed each and every item of re-
123 ceipt and disbursement by your orator during the time that your orator was engaged in the execution of said trust, and at the same time your orator exhibited said detailed written report, that is to say on August 1st, 1893, your orator further exhibited and filed in said Court of Chancery of New Jersey, [on] account of his receipts and disbursements as receiver, and thereupon upon the filing of the same, together with your orator's reports and schedules, the said Court [—] Chancery of New Jersey, on August 3rd 1893, did order and direct that your orator's said reports and all of his accounts of receipts and disbursements during the entire period of your orator's execution of said trust, should be referred to one Washington B. Williams, one of the Special Masters of said Court of Chancery of New Jersey, to take and state an account of the several sums of money which had come to your orator's hands as such receiver from what source soever derived, and the sums laid out and expended by your orator relating to your orators' business as such receiver, and further directing that said Master should report upon said accounting what further sums remained in your orator's hands as receiver for distribution, and what sums should be allowed your orator for his services in the management of said trust.

19: That thereafter and on the 11th day of August, 1893, your orator made further report to said Court of Chancery of New Jersey, showing that in the execution and discharge of your orator's duties as such receiver, your orator had incurred obligations to Messrs. Collins & Corbin of Jersey City, New Jersey, and Mr. Chas. Offutt, of Omaha, Nebraska, for legal services and expenses which were necessary and proper in the execution of your orator's trust and which were properly a charge upon said trust estate. And thereupon on said 11th day of August 1893, the said Court of Chancery of New Jersey
referred to said Washington B. Williams as Master your
124 orator's report touching said legal services and expenses connected therewith, and directed said Master to examine and report whether the said fees and charges of the said Collins & Corbin and the said Chas. Offutt should be allowed and paid, and further directed said Master to include and determine all matters connected with the charges so made by the said solicitors in his, the said Master's report upon your orator's accounts.

20: That thereafter and in conformity with the rules and practice of the said Court of Chancery of New Jersey, and in manner and form as provided by the laws of the State of New Jersey, the said Master in Chancery, after due notice to all

parties in interest, upon the correctness of your orator's said report and the items of receipts, credits and disbursements claimed to have been made by your orator, took proof from time to time and held sittings for that purpose, both in Jersey City, New Jersey, and in the City of Omaha, Nebraska, and heard the exceptions and objections of all parties after due notice, to your orator's reports and accounts as exhibited therein, whereupon the said Master did, on the 31st day of January, 1894, duly make and file his report in response to said orders or reference so as aforesaid made to said Master; that thereupon on the filing and reading of said report of said Master, the said Court of Chancery of New Jersey did on January 31st. 1894, order that the report of said Master and all matters and things therein contained, should stand in all things confirmed according to the true tenor and meaning thereof, unless good cause should be shown to the contrary before the Counsellor at Chancery Chambers in Jersey City, New Jersey, on Monday February 12th 1894, by written exceptions to said report then and there presented or previously filed, and it was further ordered thereupon that at least eight days before said February 12th, 1894, a copy of said order be served
125 upon the solicitors for the Complainants in the matter of the insolvency of the said The American Water Works Company (of New Jersey), and upon the solicitors for C. H. Venner & Co., creditors and stockholders of said The American Water Works Company (of New Jersey) who appeared before said Master, and that the same be published in the Evening Journal, a newspaper published and printed in Jersey City, New Jersey.

21: That thereafter, the said notice having been given to said parties and having been published in said paper, in manner and form as provided and directed by said Court of Chancery of New Jersey, and within the time therein directed, and no exceptions to said report having been filed, and counsel appearing for all parties to the litigation before the Master, to-wit:—Collins & Corbin appearing for your orator, Lindley M. Garrison appearing for some of the creditors and stockholders, and Flavel McGee appearing for C. H. Venner & Co., all having been heard and no cause having been shown to the contrary, it was on said 12th day of February, 1894, by said Court of Chancery of New Jersey, ordered adjudged and decreed, that said Master's report so as aforesaid filed on January 31st 1894, be, and the same was thereby confirmed and approved, and it was thereupon adjudged and found that the amount in your orator's hands as receiver, and wherewith your orator was chargeable on July 15th 1893, was the sum of $2825.91, and it was further ordered, adjudged and decreed that out of that sum and out of the property of your orator's trust, and out of

such further sums as might come to your orator's hands as receiver, there should be paid the following sums which were by said order fixed and allowed by said Court of Chancery of New Jersey, pursuant to said report, that is to say: To said Master for his services and disbursements at Jersey City, and at Omaha, on the taking of said account, the sum of $728.90;

126 to Collins & Corbin for counsel fees and legal expenses and services for the receiver, up to and including the 1st day of August 1893, the sum of $1960.04, and to Chas. Offutt for counsel fees and legal expenses and services for your orator in matters relating to said trust, up to and including the 1st. day of August, 1893, the sum of $2425.00, and to your orator the sum of $500.00 per month from July 20th, 1892, to October 20th, 1893, a total sum of $7500.00 less the payments received by your orator as shown in your orator's report exhibited to said Court. And it was further ordered, adjudged and decreed that your orator as receiver be, and he was thereby discharged from further accounting as to any receipts and disbursements prior to July 15th 1893, and that your orator's accounts as audited and stated by said Master should be fixed and allowed as your orator's final settlement as such receiver to that date, and your orator was by said order fully acquitted and discharged from all liability, except as to the balance found by said account to be then remaining in your orator's hands, amounting to the sum of $2825.91, out of which sum and out of such further sums as might come to your orator's hands from the property of the said The American Water Works Company (of New Jersey), whether at Omaha, Nebraska, or Denver, Colorado, or elsewhere, your orator was directed to pay the allowances above made in said decree, and it was further ordered and directed that the property, income and assets of the said The American Water Works Company (of New Jersey), wheresoever the same might be situated, be adjudged to be liable for and charged with the payment of the said allowances as a part of the expenses of administering said trust and of winding up said insolvent corporation, the said The American Water Works Company (of New Jersey), pursuant to the laws and statutes of the State of New Jersey under which the said corporation was created.

127 22: Of the 7500.00 so ordered allowed your orator as compensation for his services as said receiver, your orator had prior to July 15th, 1893, received the sums as fol-

lows, and no more, that is to say, on the dates, and by the voucher numbers hereinafter given, the following:

1893.		
March 10th,	Voucher 1572,	$ 500.00
March 10th,	" 1573	3,000.00
April 13th,	" 1575	500.00
May 18th,	" 1574	500.00
June 1st,	" 1392	500.00
June 29th,	" 1525	500.00
	Total,	$5,500.00

And your orator further charged himself as receiver with credits claimed by him in his said account and disallowed by said Master in the sum of $435.13, thus making the total paid to and received by your orator in account of his compensation as such receiver, $5,935.13, and the balance due your orator on account of said compensation is the sum of $1564.84.

23: Under and by virtue of the settlement and statement of your orator's accounts as aforesaid, made and [and] ordered in Court of Chancery of New Jersey, your orator's accounts stand as follows:

Amount allowed to Messrs. Collins & Corbin	$1,960.04
Amount allowed to Chas. Offutt	2,425.00
Amount allowed to the Master in Chancery	728.90
Balance due your orator as compensation	1,564.87
Total allowed and ordered paid by your orator	6,678.81
Deducting from this sum the amount deposited in The Hudson County National Bank in Jersey City.	2,390.78
Leaves a balance to be paid your orator on account of your orator's compensation and in settlement of the allowances aforesaid of	$4,288.03

Your orator has not paid any part of said balance of $4,288.03 and the same is now due and owing on the account and for the consideration hereinbefore set out.

24: On April 13th 1894, your orator filed in this Court in the case wherein your orator was recognized and confirmed as such receiver, that is to say, the case of the Denver City Water Works Co. et al., plaintiffs, and The American Water Works Co., et al defendants, same being Docket P, Folio 35, a full and complete report of the proceedings had and taken by said Court of Chancery of New Jersey, with respect to the settlement of your orator's accounts and the allowances hereinbefore made, together with a petition and application for the ratification and confirmation by this Court of the set-

tlement of your orator's accounts as made and approved in the Court of Chancery of New Jersey, and said petition and application for such confirmation is now pending in said cause to be tried in accordance with the rules and practice of this Honorable Court in such cases obtaining.

All which matters and things will more fully and at large appear by reference to said reports, proceedings, orders and decrees so as aforesaid had in and made by this Honorable Court and in the said Court of Chancery of New Jersey, or duly authenticated copies thereof here in Court to be produced, to which your orator craves leave to refer.

25: But your orator respectfully shows that by reason of the action of this Honorable Court on May 7th, 1894, transferring from the credit of said cause, the warrants of the City of South Omaha and the said $3000.00 in cash, making an aggregate of $5,295.00 so transferred to the receivers Ellis L.
129 Bierbower and Alonzo B. Hunt appointed and acting as such under the bill of Foreclosure herein, there are no other funds or assets of said Water Works Company to the credit of said cause wherein your orator was recognized and confirmed as such receiver, and the fact is that your orator has no property of any kind or description in his possession or under his control belonging to said American Water Works Company (of New Jersey), or in any manner pertaining to your orator's trust, and your orator is advised and charges the fact to be that for inasmuch as said $5295.00 were assets in your orator's possession, for the further reason that during your orator's incumbency as said receiver, he was appointed such to conserve and protect the property upon which the said Farmers' Loan & Trust Co., held its said mortgages now sought to be foreclosed herein, and for the further reason that at the time the said Bill of foreclosure was filed herein and the said receivers were appointed to take charge of and administer said property in accordance with the prayer of said bill of foreclosure, the said The American Water Works Company (of New Jersey) had earned and rendered services which entitled it to receive in the way of hydrant and meter rentals, about the sum of $40,000.00 as your orator alleges upon information and belief, and for the further reason that the said balance of $4288.03 is properly due to your orator as one of the expenses of conducting and managing the said property so taken possession of by the defendant The Farmers' Loan & Trust Co., that the said defendant The Farmer's Loan & Trust Co., and the Receivers appointed herein, should be in equity and good conscience compelled out of the income and revenues of said property so as aforesaid received and turned over to them, the said receivers, to satisfy and dis-

charge the said balance due and owing on your orator's account, that is to say, the said sum of $4,288.03.

130 26: And your orator says that the said receivers so as aforesaid appointed upon the filing of said bill by said The Farmer's Loan & Trust Co. in this cause have come in their possession, including the said warrants of the City of South Omaha and the aforesaid $3,000.00, a total of $80,000.00 and more, the exact amount your orator is unable to state; that in equity and good conscience the said defendants The Farmer's Loan & Trust Company and the said receivers and all other parties defendant or other-wise interested herein, should be required to satisfy, pay off and discharge the said $4288.03 to your said orator, to be by your orator expended and disbursed as directed by said Court of Chancery of New Jersey but the said defendant and the said receivers, and each and every of them, unjustly and inequitably refuse to recognize the claim of your orator to said money or any part thereof, well knowing that your orator is without the means or assets wherewith to pay the said charges at any time thereof, and the fact is that all the assets income and revenues, wherever situated, of the said The American Water Works Company (of New Jersey) have been placed in the hands of said receivers by this Honorable Court in accordance with the prayer of the bill of foreclosure so as aforesaid filed and instituted by said The Farmers' Loan & Trust Co. and there is not any possibility of the said $4288.03 being paid from any source except from the moneys in the hands of said receivers.

And for as much as your orator can have no adequate relief except in this Court, and to the end therefore that the defendants may, if they can show why your orator should not have the relief herein prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true direct and perfect answer make to the matters hereinbefore stated, and charged, but not under oath, an answer under oath being hereby expressly
131 waived.

And that the defendants may be decreed to account for and pay over to your orator, for the use and purposes designated in said decree of the Court of Chancery of New Jersey, the said sum of $4288.03 out of the moneys now in the hands of the receivers appointed as such in this action, and your orator prays that he may be adjudged a lien upon and a charge against any and all the funds now in the hands of the receivers of this Honorable Court to the full extent necessary to pay off and discharge the said sum of $4288.03, and that

your orator's said settlement of accounts so as aforesaid, made in the Court of Chancery of New Jersey, may be confirmed and approved by this Honorable Court.

And may it please Your Honors to grant unto your orator a writ of subpoena of the United States of America, directed to the said The Farmers Loan & Trust Company, The American Water Works Company (of Illinois), Alonzo B. Hunt, Temporary Receiver, and Ellis L. Bierbower and Alonzo B. Hunt, receivers of the property of the said The American Water Works Company (of New Jersey), commanding them on a day certain to appear and answer unto this Cross-bill, and to abide by and perform such order and decree in the premises as to this Honorable Court shall seem meet and proper and required by the principles of equity and good conscience.

E. HYDE RUST,
Receiver of the American Water Works Company (of Jersey)
By CHAS. OFFUTT, His Solicitor.

CHAS. OFFUTT,
Counsel.

United States of America,
State of Nebraska, County of Douglas—ss.

132 The affiant Chas. Offutt having been first duly sworn deposes and says that he is the solicitor for the orator herein, E. Hyde Rust; that said E. Hyde Rust is now absent from the District of Nebraska, and is in the State of New Jersey; that the statements made in the foregoing cross-bill are true, except as to such matters which are in said cross bill alleged to be true upon information and belief, and said matters this affiant alleges that he believes to be true.

CHAS. OFFUTT,

Subscribed in my presence and sworn to before me this 11th day of May, 1894.

[Seal] FRANCIS J. MIEDING,
Notary Public.

Upon the back of said Cross-bill of E. Hyde Rust appear indorsements in the words and figures following, to-wit:—No. 96 Doc. Q. In U. S. Circuit Court, District of Nebraska. E. Hyde Rust, Suspended Receiver of The American Water Works Co. (of New Jersey) Complainant, vs. The Farmers Loan & Trust Co., et al., defendants. The Cross-bill of E. Hyde Rust, Suspended Receiver of The American Water Works Company (of New Jersey). Filed July 17th, 1894. Elmer D. Frank, Clerk.

Chas. Offutt, Solicitor for E. Hyde Rust. Leave to file this Cross-bill given this July 17, 1894. Elmer S. Dundy, Judge.

Thereupon afterwards, to-wit:—On the 1st day of October, 1894, Demurrer of Farmers' Loan & Trust Co. to Cross-bill of E. Hyde Rust was filed in said case, which said Demurrer is in the words and figures following, to-wit:—

In the Circuit Court of the United States, in and for the District of Nebraska.

133 E. Hyde Rust Suspended Receiver,
No. 96 "Q" vs.
Farmer's Loan & Trust Co. et al.

The Demurrer of Farmer's Loan & Trust Company defendant, to the cross-bill of complaint of E. Hyde Rust, Cross-plaintiff:

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said cross-plaintiff's bill to be true, in such matter and form as the same are therein set forth or alleged, does demur thereto, and for cause of demurrer shows that the said cross-plaintiff has not in and by his said cross-bill made or stated such a case as doth or ought to entitle him to any such [discovery] or relief as is thereby sought or prayed for, from, or against this defendant demands the judgment of this Honorable Court, whether it shall be compelled to make any further or other answer to the said Cross-bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

HALL & McCULLOCH,
Solicitors for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

HALL & McCULLOCH,
Solicitors and Counsel for defendant Farmers' Loan & Trust Company.

State of Nebraska,
County of Douglas, District of Nebraska—ss.

R. S. Hall being first duly sworn deposes and says that he is the Solicitor of Defendant Farmers Loan & Trust Com-
134 pany. The foregoing demurrer to the cross-bill of E. Hyde Rust is not interposed for delay.

R. S. HALL.

Subscribed in my presence and sworn to before me this 1st day of October, 1894.

Upon the back of said Demurrer appear indorsements in the words and figures following, to-wit:—No. 96. Doc. Q. U. S.

Circuit Court District of Nebraska. Farmers' Loan & Trust Company, vs. The American Water Works Company, et al. Demurrer. Filed Oct. 1, 1894. Elmer D. Frank, Clerk. Hall & McCulloch Solicitor- for Defendant.

Thereupon afterwards, to-wit:—On the 17th day of November, 1894, Entry of Appearance of E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey) and the American Water Works Company (of New Jersey) and motion of said Defendants for Leave to file their Answer herein instanter was filed in said case, which said Entry of Appearance and motion is in the words and [words] following, to-wit:—

In the Circuit Court of the United States within and for the District of Nebraska.

Farmer's Loan & Trust Company, Complainant,
v.
The American Water Works Company, et al., Defendants.

Entry of Appearance of E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey) and the American Water Works Company (of New Jersey) and Motion of said Defendants for Leave to file their Answer herein instanter.

135 Now come the said defendants E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey) and The American Water Works Company of (New Jersey), and entering their voluntary appearance herein, move the Court to permit them to file herein instanter, their joint and several answer to the complainant's bill of Complaint, on the grounds and for the reasons as follows, to-wit:—

1:—These defendants have not, either of them, been served with a subpoena in chancery or other process of this court, nor has there ever at any time been any order served upon these defendants [of] either of them, directing them or either of them, to appear, plead, answer or demur herein at any time, or under any circumstances whatever.

2:—The residence and abiding place of each of these defendants since the date the Bill of Complaint was filed herein, always has been and still is in the City of Jersey City, in the State of New Jersey, and this fact was well known to the complainant herein, as will appear from the Bill of Complaint, and as will also appear from the fact that the President and solicitors of the Complainant have been since long prior to the institution of this suit, and still are, personally acquainted with these said defendants, and especially with the defendant E. Hyde Rust, and [known] his residence, citizenship and abiding place.

3:—Since the date the Bill of Complaint was filed herein it always has been and still is, as the said complainant, its offi-

cers, attorneys and solicitors well knew, practicable to make service, upon either of these defendants with great ease and facility, of any order which this court might make, directing absent defendants to appear, plead, answer or demur, by any day designated by this Court, and though well knowing that fact, the said Complainant, its attorneys and solicitors have failed to cause any such order to be served upon these defend-
136 ants or either of them, and no such order has ever been served upon these defendants or either of them.

4:—Since the date the Bill of Complaint herein was filed it has been and still is practicable for the said Complainant and its attorneys and solicitors to have caused a copy of such order to have been served upon the person or persons in possession or charge of the property described in the said bill of Complaint herein, and notwithstanding that fact, the said complainant and its said solicitors have failed and neglected to make service of any such order upon any person or persons in possession or charge of said property, and in fact they have failed and neglected to make service of the same upon any person or persons whomsoever.

5:—The order entered herein on absent defendants on December 1st 1893, requiring these defendants "to appear and plead, answer or demur to the Complainant's said Bill of Complaint, on or before Monday February 25th 1894, and that in default thereof an order be entered taking said Bill of Complaint *pro confesso*" was entered improvidently and without warrant or authority of law, and the Court was without power or jurisdiction to make said order, for the reason that the affidavit for said order on non-resident defendants, was insufficient and defective in the particulars as follows, to-wit:—

a:—Said affidavit did not allege that it was impossible to obtain actual service upon these defendants or either of them.

b:—Said affidavit did not allege that any diligence had been used with respect to obtaining such service upon these defendants [of] either of them.

c:—Said affidavit did not allege that such service upon these defendants or either of them, was not practicable, and the truth is that said allegations could not have been made
137 because the complainant knew that the order directing these defendants to appear, plead, answer or demur by a day certain, could at any time be served upon either of these defendants in the State of New Jersey.

d:—And the truth is that actual service could have been made in the District of Nebraska upon these defendants by making such service upon Charles Offutt or William H. Hall,

the persons designated by the defendant E. Hyde Rust, Receiver, as the parties upon whom service might be made in any suits against said Receiver Rust and The American Water Works Company (of New Jersey), which said designation was made in pursuance of an order of this Court of date September 23rd. 1892, in the case of The Denver City Water Works Company, et al. vs. The American Water Works Company, et al., the same being Docket "P", Folio 35 pending in the Court.

6:—There was no warrant or authority for the making of any affidavit for an order on non-resident defendants, or for service by publication, for the reason that at the time the Bill of Complaint herein was filed, and ever since, it has been within the power of the said Complainant, as the said Complainant well knew with the greatest ease and facility, to have made actual service of a subpoena in chancery issuing upon said Bill of Complaint, upon the defendant E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey), for the reason that this Honorable Court, by an order made on the 23rd day of September 1892, in the case pending herein, wherein The Denver City Water Works Company and others were complainants, and The American Water Works Company, and others were defendants, the same being Docket P, Folio 35, this Court did at the same time that the appointment of the defendant E. Hyde Rust as Receiver of The American Water Works Company (of New Jersey) by the Court of Chancery of said last named State was ratified and confirmed, order and di-
138 rect that the defendant E. Hyde Rust, should "immediately on his qualification, designate in writing filed in this action, (meaning said action of The Denver City Water Works Company, et al. v. The American Water Works Company, et al., Docket P., Folio 35) at least two persons residents of the City of Omaha, Nebraska, upon whom service may be made in any action brought against the defendant The American Water Works Company (of New Jersey) or against said receiver, (meaning the defendant E. Hyde Rust), in the event of the absence from the State of Nebraska, of the said E. Hyde Rust." And in pursuance of said direction and order of this Court so made and entered, the said defendant E. Hyde Rust did, immediately upon his said qualification, in a writing filed in said cause in this Court designate Charles Offutt and William H. Hall, both residents of the City of Omaha, Nebraska, as the persons upon whom service might be made in any action brought against the defendant The American Water Works Company (of New Jersey), or against said Receiver, in the event of the absence of said E. Hyde Rust from the State of Nebraska, and while, on the date that the Bill of Complaint herein was filed, the defendant E. Hyde Rust was absent from the State of Nebraska, the truth is that said Charles Offutt and the said

William H. Hall were at that time and for many days thereafter continued to be, residents of the City of Omaha, Nebraska, (the said Hall having left the State of Nebraska about the first day of December 1893), but the said Charles Offutt was at the time of the filing of the Bill of Complaint herein, and ever since has been and still is a resident of the City of Omaha, Nebraska, and has at all times been in said City of Omaha, so that service could have been made at any time upon him herein had the complainant so elected.

7:—The entry of appearance, the plea, and the answer filed in the name of and for this defendant The American Water Works [works] Company (of New Jersey) by John L. Webster, solicitor and of Counsel, was without warrant or author-
139 ity for the reason that said John L. Webster had never been employed or authorized to enter said Appearance or act as the solicitor or counsel for the defendant The American Water Works Company (of New Jersey), but the defendant E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey), was the only person or party authorized or empowered to appear for or in the name of the said The American Water Works Company (of New Jersey), for inasmuch as ever since July 20th, 1892, the said Company that is to say, The American Water Works Company (of New Jersey,) its officers, directors, agents and attorneys, and each and every of them, had been by the Court of Chancery of New Jersey, enjoined and restrained from "receiving any debts due to it, and from paying and transferring any of its moneys and effects, and from in any manner continuing its business or exercising any of the franchises or privileges of its charter, and from holding any meetings, or alleged or pretended meetings, at which action might be taken concerning the business of said company, or attempting to use its name and its privileges and franchises for any purpose whatever." And said injunction has been in full force and effect from said July 20th, 1892, and is now in full force and effect and the said John L. Webster as solicitor aforesaid, made said appearance in the name of The American Water Works Company (of New Jersey), under the direction only of C. H. Venner, one of the former Vice Presidents of said Company, who had been served with a copy of said injunction and who was a party to the suit wherein said injunction was entered, and upon whom said injunction was binding, and the said entry of appearance by the said John L. Webster was in violation of, and contrary to, the said injunction so as aforesaid made and granted.

8:—There has never been any final judgment entered in this cause, nor has there been any default made or entered against

these defendants or either of them, and they, the said de-
140 fendants and each of them, submit that by virtue of the statute in such cases made and provided with respect to proceedings against non-resident defendants, they and each of them have the right to enter their appearance and file their answer at any time, even within one year after final judgment.

And in support of this Motion these defendants say that the matters and things herein alleged as cause for their right to enter their voluntary appearance and file their said answer, will more fully and at large appear by reference to the Bill of Complaint herein filed on October 9th 1893; by reference to the affidavit for an order on non-resident defendants made by C. H. Lamar, filed herein on December 1st. 1893; by reference to the files in this cause showing that the order on absent defendants made by this Court herein on December 1st, 1893, has never been served upon these defendants or either of them, and further showing that said order has never been served upon any person or persons in possession or charge of the property described in the Bill of Complaint, or any part thereof; by reference to the order of September 23rd, 1892, entered in the case pending in this Court as Docket P., Folio 35, entitled The Denver City Water Works Company, et al. v. The American Water Works Company, et al., which said order ratified and confirmed in this Court the appointment of E. Hyde Rust as Receiver of The American Water Works Company (of New Jersey); by reference to the proceedings, orders and decrees so made in the Court of Chancery of New Jersey in the case wherein the defendant E. Hyde Rust was appointed Receiver of the American Water Works Company (of New Jersey) an exemplified copy of the record in which case, together with all proceedings therein was filed in this Court on the ..... day of ..... 1894, in the case of The Denver City Water Works Company, et al., v. The American Water Works Company, et al., Docket P, Folio 35; by reference to the designation of parties upon whom Summons could be served, filed in this Court in said last
141 named case on October 18th, 1892, to all of which said papers, orders, proceedings, pleadings and decrees, or duly authenticated copies thereof here in Court to be produced, these defendants crave leave to refer in support of this their said motion.

And so the defendants will ever pray.

E. HYDE RUST,
Receiver of the American Water Works Company (of New Jersey) and The American Water Works Company (of New Jersey).

By CHAS. OFFUTT, Their solicitor.

Upon the back of said Entry of Appearance of E. Hyde Rust Receiver of The American Water Works Company (of New Jer-

sey) and the American Water Works Company (of New Jersey) and motion of said defendants for leave to file their Answer herein instanter, appear indorsements in the words and figures following, to-wit:—No. 96 Doc. Q. In U. S. Circuit Court, District of Nebraska. Farmers Loan & Trust Company, Complainant, vs. American Water Works Co. et al., defendants. Entry of Appearance of E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey) and the American Water Works Company (of New Jersey) and Motion of said defendants for leave to file their Answer herein instanter. Filed Nov. 17, 1894. Elmer D. Frank, Clerk. Chas. Offutt, Solicitor for Defts.

Thereupon afterwards, at the November 1894 Term of said Court, on the 24th day of November, 1894, the following proceedings were had and done in said case as appears of record on folio 236 Journal "T" of said Court, to-wit:—

142 Farmers Loan & Trust Company,
96-Q. vs.
The American Water Works Company, et al.

On motion of defendant A. B. Hunt, by his Solicitors Hall, McCulloch & Clarkson, leave is hereby granted him to answer herein in ten days from this date.

Thereupon afterwards, at the November 1894 Term of said Court, on the 26th day of November, 1894, the following proceedings were had and done in said case, as appears of record on folio 239 Journal "T" of said Court, to-wit:—

Farmers Loan & Trust Company,
96 Q. vs.
American Water Works Company, et al.

This cause coming on to be heard on the motion of certain defendants for leave to answer herein, was argued and submitted to the Court by Solicitors for the respective parties, whereupon the Court takes same under consideration.

Thereupon afterwards, to-wit:—On the 4th day of December, 1894, Answer of A. B. Hunt, Receiver, was filed in said case,

which said Answer is in the words and figures following, to-wit:—

United States Circuit Court, District of Nebraska.

143 Farmers Loan & Trust Company, Complainant,

vs.

The American Water Works Company (of Illinois), The American Water Works Company (of New Jersey), E. Hyde Rust as suspended Receiver, and Alonzo B. Hunt, Temporary Receiver, Respondents.

ANSWER OF ALONZO B. HUNT TEMPORARY RECEIVER OF THE AMERICAN WATER WORKS COMPANY, OF NEW JERSEY.

This defendant now and at all times hereafter saving and reserving to himself all benefit and right of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said Complainant's said bill of complaint contained, for answer thereto or of so much [as] such parts thereof as defendant is advised is or are necessary or material for him to make answer unto, this defendant for answer says:

1:—This defendant represents that prior to the 20th day of May, 1880, the City of Omaha, a municipality of the State of Nebraska, desiring to construct, or to cause to be constructed, a system of Water Works in the City of Omaha, employed one J. D. Cook to report to the City Council of the City of Omaha, a plan for the construction of a system of water-works in the said city, and that said J. D. Cook, being a skilled hydraulic engineer, did report to the City Council of the City of Omaha a plan for the Construction of such a system of water works, said report being found printed and published by the City of Omaha in a book entitled " Charter and Ordinances of the City of Omaha" on pages 576 to 593 inclusive.

144 That said report was filed in the office of the City Clerk of the City of Omaha, on the 25th day of May, 1880, and was afterwards approved by the City Council of the City of Omaha, on the 18th day of June, 1880, and is set forth at large in the said book, entitled "Charter and Ordinances of the City of Omaha," at pages 576-593 inclusive.

That afterward on the 31st day of May, 1880, the said J. D. Cook filed an appendix to his said report, which said appendix may be found on pages 594-595 of said book above referred to, and said which appendix was approved by the City Council on the 8th day of June, 1880.

2:—This answering defendant further says that afterwards on the 11th day of June, 1880, the City Council of the City of

Omaha, passed an Ordinance which was on the same day approved by the Mayor of the said City, being Ordinance No. 423, entitled "An Ordinance to authorize, procure and construct a system of Water Works in the City of Omaha, Nebraska." In Section 1 of said Ordinance it is provided that any person, Company, corporation or association, who shall erect, construct and maintain water works of the magnitude and character therein described, and as more fully and at large appears in the said report and appendix of the said J. D. Cook, for the purpose of supplying the said City and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes, shall have the right of way along and upon and under the public streets of the said City for water mains, pipes and fire hydrants, during the time such person, company, corporation or association shall maintain and operate such system of water works, but upon the terms and conditions in the ordinance described.

Section 3 of said Ordinance sets forth the pumping capacity of such system of Water Works, and also the capacity of the water reservoirs to be constructed in connection there-
145 with.

Section 4 of said ordinance provides the size, length and capacity of the water mains, subject to approval and inspection by the City of Omaha.

Section 6 of said Ordinance provides for the location and placing of fire hydrants upon and along the streets of said City for the purposes of fire protection, subject to such changes and modifications as the City Council of said City shall direct as to location.

Section 7 of the Ordinance provides for the furnishing of a supply of water adequate to the wants and use of the public and for certain sanitary purposes therein set forth.

Section 10 of said Ordinances fixes a maximum charge to be made for the consumption of water for the various purposes and uses therein set forth.

"Sec. 11. In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and

management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in Section 14 of this Ordinance; Provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

146 Section 12. Provides for the receiving of proposals for the construction of said Water-Works.

Section 13. Provides when the water-plant shall be completed.

"Sec. 14. "The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said Water-Works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, and these two to select the third: Provided that nothing shall be paid for unexpired franchise of said company."

In Section 3 of said Ordinance No. 430, it is provided that the City Clerk of the City of Omaha should advertise for sealed proposals for furnishing the City of Omaha with water for fire protection, and for public use for the term of twenty-five (25) years, according to the provisions of said Ordinance, and further provides that the bids received shall specify the price per hydrant per year to be paid therefor by the City of Omaha as in said Ordinance and in said report of J. D. Cook provided, and that said bids should also be accompanied by an acceptance of the provisions of said ordinances in the event that the contract for the supply of water for the public and fire protection should be awarded.

3:—In Compliance with said advertisement for sealed proposals, one Sidney E. Locke made a bid for the construction of a system of water works, which was in terms as follows:—

"PROPOSAL FOR THE CONSTRUCTION AND MAINTENANCE OF WATER WORKS IN THE CITY OF OMAHA, STATE OF NEBRASKA.

"To the Honorable, the City Council of the City of Omaha:

"The undersigned hereby proposes to erect, construct and maintain water works in the City of Omaha for furnishing the City of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five (25) years from the time of the completion of said works, as fixed by an Ordinance
147 No. 423, passed and adopted by your Honorable Body June 11th, 1880, and another Ordinance amendatory thereof, No. 430, passed and adopted July 14th 1880, and as re-

quired by the details and specifications in said Ordinances set forth and referred to.

The Undersigned further, and in addition to the foregoing, and in further compliance with the requirements and specifications in said Ordinance set forth or referred to, propose to so erect or construct said Water Works as to furnish water through not less than two hundred and fifty hydrants as specified, and to so furnish said water so as above stated at a rate of eighty-four ($84) dollars per year per hydrant, and further propose to erect and furnish water through such intermediate hydrants, in addition to the number first above given, as may by the provisions of said Ordinances and in Accordance with the report of J. D. Cook therein referred to, be further called for or required, at a rate of $10.00 per year per hydrant.

The undersigned further proposes, in case hydrants in addition to the number and quantity hereinbefore specified, shall during the time provided for the maintenance of said water works be required on new mains, to erect, construct, maintain and furnish water through the same at the time or times and in the manner by said ordinance or the report of said J. D. Cook provided, at a rate of sixty dollars ($60.00) per year per hydrant.

The undersigned further proposes and states that the water so by the proposed works to be furnished shall be for the uses of the kind and quantity, and at rates not to exceed those by said Ordinances fixed, determined or referred to, except as specified herein in connection with hydrant use.

This proposal is hereby accompanied by a bond duly executed in the sum of Twenty-five Thousand ($25,000.00) Dollars as required.

148 The conditions and specifications of said Ordinance are hereby accepted in case award of contract for said works is made to the person submitting this proposal."

S. E. LOCKE.

Dated, Omaha Neb., July 20th, 1880.

Which said proposal was accepted by the City of Omaha, and afterwards on the 20th day of July, 1880, a written contract was entered into between the said Sidney E. Locke and the City of Omaha, for the construction of a system of water works, which said contract made reference to the said report of said J. D. Cook and to said Ordinances Nos. 423 and 430, and to the advertisement for sealed bids which was made by the City Clerk

pursuant to said Ordinances, which said contract was in words and figures as follows:—

"WATER WORKS CONTRACT.

"This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th day of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, Witnesseth:—

"Whereas, the City of Omaha did on the 11th day of June, A. D. 1880, pass its certain Ordinance No. 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska," and did on the 14th day of July, A. D. 1880, pass its certain Ordinance, No. 430, entitled "An Ordinance to Amend Sections three (3) six (6), and Twelve (12), of Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintenance of Water Works in the City of Omaha, State of Nebraska, and

Whereas, the City Council of said City of Omaha, did receive from J. D. Cook, Engineer, on the 25th day of May, A. D., 1880, the report and on the 31st day of May the appendix to said report referred to in section One (1), of said Ordinance No. 423; and did on the 8th day of June, 1880, adopt and approve said report and appendix; and

149 Whereas, the said City of Omaha did in compliance with the provisions of said Ordinance, advertise from the 16th day of July, 1880, to the 20th day of July 1880, for sealed proposals for furnishing the City of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of the work, through two hundred and fifty hydrants of the character and locations mentioned in the Ordinances Nos. 423 and 430, and said report of said J. D. Cook, engineer, as approved; and

Whereas, the said City Council of the City of Omaha, did on said 20th day of July A. D. 1880, accept said proposal of Sidney E. Locke and did award said contract to him, and did order that the said contract should be formally made by the Mayor of the City of Omaha, acting in its behalf.

Therefore it is hereby contracted and agreed by and between said parties as follows:—

In compliance with said Ordinances, Nos. 423 and 430 the said report of the said J. D. Cook, Engineer, and the appendix thereto as approved by the said City Council, said advertisement, proposal and accepting thereof and awarding of said contract (all of which are herein recited, as being understood

to be parts of this contract) the said Sidney E. Locke party of the second part contracts and agrees with said party of the first part to erect, construct and maintain said water works in the City of Omaha, and to furnish the City of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the time of completion of said works, as fixed by said ordinances, Nos. 423 and 430, and by said report of said J. D. Cook, as approved by said City Council. Said party of the second part further agrees to furnish said water through not less than two hundred and fifty hydrants of the character and as located and placed in said Ordinances and approved report, at the rate of eighty-four dollars ($84.) per year per hydrant, and to furnish said water through
150 such intermediate hydrants in addition to the number first given as may by the provisions of said ordinances and in accordance with said approved report be further called for or acquired, at the rate of ten ($10.00) per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified shall, during the said term of twenty-five years, be required on new mains, erect construct and maintain said new mains at the rate of sixty dollars ($60.00) per year per hydrant.

And in consideration of the said agreement of the said Sidney E. Locke, the said party of the first part agrees to pay for said hydrant water supply at the rates per hydrant per year above specified, The said payment to be made by warrants drawn upon the first day July and the first day of January of each year and every year of said term upon the treasury of said City; the payment for the water from each hydrant to commence when it is actually ready for use and the City Clerk notified thereof, and the pay thereof shall cease during any time that the said hydrant shall be out of repair or unfit for use.

This contract shall take force and effect only upon its approval by the City Council of the City of Omaha.

In Testimony whereof we have hereunto set our hands at Omaha, Nebraska, the date first above written."

(Signed) THE CITY OF OMAHA,
By C. S. CHASE, Mayor.
SIDNEY E. LOCKE.

Signed in the presence of
CHAS. F. MANDERSON
C. J. WESTERDAHL.

Approved by the City Council, July 20, 1880.

(Signed) JAMES E. BOYD,
Pres't City Council.

Attest: J. F. McCARTNEY, City Clerk.
(Seal City of Omaha).

151 That afterwards on the 26th day of July, 1880, the said Sidney E. Locke for a good and valuable consideration, did assign, sell transfer and set over unto "The City Water Works Company of Omaha, a corporation organized under and existing under and by virtue of the laws of the State of Nebraska, said contract for the construction, operation, control, and maintenance of water works in the City of Omaha, with all the rights, privileges, immunities, profits, duties and obligations that he, said Sidney E. Locke, did have thereunder, to the same extent in each and every part as if said contract had been made with the City Water Works Company of Omaha originally, and not [while] said Sidney E. Locke."

4:—That afterwards the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, pretended to purchase of and from said City Water Works Company of Omaha the said Water Works plant in the City of Omaha, including the real estate connected with the operation of the same, by means of which the City of Omaha and its inhabitants were and are supplied with water for fire and other purposes, and thereby pretended to assume, and must be held to assume, and to be bound by all the terms and conditions of said contract between the said City of Omaha and the said Sidney E. Locke, and to maintain and operate said system of water works for the use and benefit of the City of Omaha in the same manner and to the same extent as the said Sidney E. Locke by his said contract was bounded to do.

That it was well known and understood between all the parties thereto that the chief object of the City of Omaha in taking the respective steps aforesaid looking toward the construction of said system of water works, was to supply the City of Omaha with water for fire protection and for public and domestic use in the same manner and to a like extent as if the said City of Omaha had in its own right and at its own expense constructed and owned said system of water works, and all of which
152 facts the complainant company and all and singular of the owners and holders of the series of bonds in the Bill of complaint set forth were bounden to know and had notice.

5:—That the defendant, The American Water Works Company of Illinois, was not by law duly authorized on or about the first day of July, 1887, or at any other time to make and execute the mortgage in the Bill of Complaint described upon the said system of water works and was not by law duly authorized to secure the said issue or series of bonds in the Bill of Complaint described by any mortgage or deed of trust upon the said system of water works in the City of Omaha.

That the American Water Works Company of Illinois, the mortgagor company herein, was not under and by virtue of its articles of Incorporation authorized or empowered to make or execute said mortgage upon the said water plant, nor was said Company authorized thereunto, under and by virtue of the laws of the State of Illinois, nor under [—] by virtue of the laws of the State of Nebraska, where said property is situate, to make and execute said mortgage upon said property, and all of which facts the complainant company, as well as all and singular of the owners and holders of said bonds must be held bounded at all times to have known.

That said franchise, privilege, and easement granted by the City of Omaha to the said Sidney E. Locke was a personal privilege granted by the City of Omaha to the said Sidney E. Locke, to be used only for the use and benefit of the City of Omaha and subject to its control, and so the defendant companies must be held to have accepted the same, and that no privilege or right of authority was ever granted, or intended to be granted by the City of Omaha to the said Sidney E. Locke, or his assigns to
mortgage encumber or otherwise dispose of said fran-
153 chise or any of the property constituting a part of said system of water works or incidental or necessary thereto, or pertaining to the maintenance and operation of said system of waterworks or to do any other or manner of thing that would tend to take away or deprive them of their power to maintain and operate said system of water works for the use and benefit of the City of Omaha, as under said ordinances and said contract with Sidney E. Locke was and is provided for.

This defendant further answering says that all the property, real and personal, as well also the privileges, franchisements and easements intended to be conveyed by said mortgage, were and are necessary to the use and enjoinment of the person or company operating said water plant and were and are necessary to such company to enable it to maintain said system of water works and to supply the said City of Omaha with water for domestic uses and for fire protection, all of which matters and things were well known to the Complainant company at the time of the execution of the said pretended mortgage, and were also so known to the persons becoming the owners and holders of the bonds pretended to be secured thereby.

That it was well known to the Complainant Company, as well as to the said bondholders who purchased the bonds pretended to be secured by said mortgage, that to enforce said mortgage by decree of foreclosure and sale of said property, or by the taking possession of said property by the said Trustee under and by virtue of said mortgage would deprive the defend-

ant Companies of the power to maintain and operate said water plant, and would render said defendant companies powerless to fulfill the obligations they assumed to the City of Omaha, and would thereby destroy and take from the City of Omaha the right which it had secured to itself by said contract with Sidney E. Locke to have its inhabitants supplied with water for domestic use, and the municipality to be supplied with
154 water for fire protection and other purposes. Whereby, and by reason whereof said companies were without authority of law to make said mortgages, and the same were and are illegal and void.

These defendants further answering say that by Section II of said Ordinance 423, which is made a part of said contract with the water Company, it is provided:—

"In case of the refusal or neglect of any person, company, or corporation or their assigns, who shall construct water works under this ordinance, to comply with the provisions and requirements herein contained and each thereof, and to keep such water works in good order and repair and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto or connected therewith, subject to the payment of just compensation therefor, to be ascertained as provided in Section 14 of this Ordinance; provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

That under and by virtue of the provisions of said section the City of Omaha had and has a material interest in said property of which it could not and cannot be divested by either a mortgage or sale under foreclosure, and further that the making of said trust deed was in violation of the provisions of said section, and that a foreclosure of said mortgage and sale of the water plant would deprive the defendant company of the power of complying with its duties and obligations to the City of Omaha, which would result in the forfeiture of said property and all the rights, priviieges and immunities granted to the defendant Companies, and re-invest the ownership, possession, control, and management of said system of water works
155 in the City of Omaha, and by reason whereof said mortgages were and are illegal and void, and were and are against public policy.

6:—This defendant further answering says that while the said pretended mortgage purports and pretends to cover all the property and assets of every kind and nature of the mortgagor Company, and also its privileges, franchises, easements and choses in action, no such extensive authority was ever undertaken or pretended to be granted by the said mortgagor Company, and its said officers who assumed to execute the said mortgage, and that the said J. R. Custer, assuming to act as President of the said Mortgagor Company, in the execution of said mortgage, acted without authority from said Company in the making and executing of said mortgage, in this, that they were never authorized to execute this particular instrument; that all the authority possessed by the said Custer as President and the said Griffin as Secretary was such power and authority as were vested in them as such officers under the articles of incorporation and the by-laws of the mortgagor Company, and by the Minutes of the proceedings of its Board of Directory, and that nowhere in their said articles of incorporation or by-laws or minutes of proceedings of its Board of Directory was there authority granted to the said persons to execute the instrument in the Bill of Complaint set out.

Defendants further say that each and singular of the averments hereinbefore set forth touching the [infirmitives] existing in said mortgage equally apply in truth and in fact to the said supplemental mortgage in the Bill of Complaint described, and that no bonds have been issued or sold for value under either of said mortgages.

7:—That the defendant, The American Water Works Company (of Illinois) is a corporation created and organized
156 under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, nor in any manner and form as provided by the laws of the State of Nebraska, authorized to do business in the State of Nebraska.

That said defendant, The American Water Works Company (of Illinois) was not by law authorized on the first day of July, 1887, or in January 1889, or at any other time, to make or execute the mortgages or either of them, in said Bill of Complaint described, upon said system of water works, and was not by law authorized to secure the said alleged issue or series of bonds in said Bill of Complaint described, upon said system of Water Works, by any mortgage or deed of trust upon said system of water works in the City of Omaha; that said Company was not under and by virtue of its Articles of Incorporation authorized and empowered to make and execute said mortgage upon said plant or any part thereof, nor was said Company authorized

thereunder or by virtue of the laws of the State of Illinois, nor under and by virtue of the laws of the State of Nebraska, where said property was situated, to execute or make said mortgage upon said property, and said mortgage was an effort to create an indebtedness far in excess of the limit authorized by law, that is, in excess of two-thirds of the capital stock of said Mortgagor Company; that said mortgagor Company's capital stock was and is only $600,000.00 and it had no power or authority to create or incur a liability in excess of $400,000.00 and the stockholders of said alleged mortgagor company never authorized said mortgage to be given on all the property described therein, and particularly did said stockholders not authorize the mortgage of said contract and franchise from the City of Omaha. And they say that said Illinois Company could not in any event have made any mortgages upon said property, especially the said contract with the City of Omaha, except upon the conditions and terms prescribed by said City of
157 Omaha, which never agreed thereto, and except upon the further condition and terms that the said The American Water Works Company (of Illinois) and the said complainant herein should maintain and operate the said water works plant and provide for the same and all thereof being kept a going concern for the entire time of the said contract with the said City of Omaha, and except upon the provision and condition that the said Water Works Company and the said Complainant and the several holders of the bonds issued under said alleged mortgage, should agree and provide for the furnishing of the necessary machinery, material-pipe, engines, hydrants and other necessary apparatus, to enable said Water Works plant to be maintained and operated, and to keep and hold good its said franchises and contract with the City of Omaha that said Illinois Company had no right, power or authority to make any mortgage whatever on property in Nebraska, if such mortgage exceeded two-thirds of the Capital Stock of said Illinois Company, and that said Capital Stock was and is only $600,000.00 and no more; that said franchises and privileges granted to said Sidney E. Locke by the City of Omaha was a personal privilege granted to the said Sidney E. Locke for the use and benefit of the City of Omaha and its inhabitants, and subject to its control, and so under such terms and conditions, and subject to such charges, the said complainant accepted the said mortgages on said plant, and the said City of Omaha never did, at any time, agree to the making of said mortgages or the encumbering of said property or franchises, or to the assignment of said franchises of all which facts the bondholders and Trustee had notice.

8:—This defendant further answering saith that the defendant, The American Water Works Company (of Illinois) was a

pretended corporation pretended to be incorporated under the laws of the State of Illinois for the [persons] of enabling the persons connected therewith to do and transact business
158 in the State of Nebraska, alone; and which said pretended corporation did not then and there intend to transact any business in the State of Illinois, and never has transacted any business in the State of Illinois; and never has owned any property in the State of Illinois; and that none of its pretended stockholders were citizens or residents of the State of Illinois, but the [sold] purpose of the said pretended organization under the laws of the State of Illinois was to enable the owners of the Water Plant in the City of Omaha, State of Nebraska, to exercise the powers and enjoy the privileges which could not be exercised or enjoyed under the laws of the State of Illinois; and was formed for the further purpose of evading the laws of the State of Nebraska; all of which matters and things in this paragraph stated were known to the trustee under the mortgage, and the respective bondholders, if any there be, had notice. 9. These defendants further answering deny that default was made by the Mortgagor Company in the payment of the coupons, as set forth in paragraph twenty (20) of the Bill of Complaint, and in that connection further say that the coupons maturing January 1st, 1892, amounted to the sum of $98,000.00 and of which sum only $41,279.00 are outstanding, and of this sum $8,000 are owned and held by the Omaha National Bank, and were purchased and are held by the Omaha National Bank for the purpose of avoiding a forfeiture under the said mortgage, and that of said coupons $18,275. are owned by the United Water Works Company, and are held for the purpose of [evoiding] a forfeiture under said mortgage, thus leaving but a sum of $15,000. of unpaid coupons maturing January 1st, 1892.

Of the $98,000. of coupons maturing July 1st. 1892, there are only $48,000. outstanding, and of which amount $45,000. are held and owned by persons not desiring a default or a foreclosure under said mortgage.

159 Of the coupons maturing January 1st, 1893, only $22,500. are outstanding, and of which amount $21,290, or nearly the whole amount, are controlled by C. H. Venner, and who is likewise opposed to the said foreclosure.

Of the coupons maturing July 1st, 1893, $32,000 have been purchased and are now controlled by persons who have waived default and are opposed to foreclosure.

That the whole amount of outstanding unpaid coupons is $209,755. prior to January 1st, 1894, and that the greater portion of which are held by persons who are opposed to fore-

closure of said mortgage, and have not desired any default to be declared thereon, and that the whole amount of overdue coupons controlled by the Farmer's Loan & Trust Company, Complainant, is less than one half of all the overdue coupons outstanding.

In this connection this defendant further answering says that the Complainant Company as trustee has never made any demand up-- the mortgagor Company for the payment of any interest coupons, and that no demand has been made upon said trustee company by the holders of a majority of said coupons to declare a [forefeiture] or to foreclose said mortgage.

In this connection this [defandant] further answering says that the water plant at Omaha has at all times been earning sufficient money to pay its operating expenses and accruing interest and would have paid all said coupons upon maturity thereof if it had been permitted to manage its said property, and in this connection further says that there is sufficient money in the hands of this Court belonging to the defendant companies to pay and take up all the coupons maturing before the first of January, 1894, which are in the hands or under the control of the Complainant company, and sufficient to pay and take up the coupons held by persons now insisting upon foreclosure.

This defendant for further answer says, that the defendant, the American Water Works Company of New
160 Jersey, was and is a pretended corporation, pretended to be incorporated under the laws of the State of New Jersey, and that the sole and only purpose of the said incorporation under the laws of the State of New Jersey, was to allow the owners of the water plant at Omaha, Nebraska, to exercise and enjoy still greater powers and privileges than they could enjoy or exercise under the Articles of Incorporation of the Illinois Company, and more particularly to allow said persons to consolidate or amalgamate the property of the Omaha Water Works Company at Omaha, with certain other Water Works property located at Denver, in the Stafe of Colorado, and which in the opinions of the persons who formed such corporation under the laws of the State of New Jersey, could not be accomplished under the Articles of Incorporation of the said Water Works Company at Omaha, nor under the Articles of Incorporation of the American Water Works Company of Illinois; and that at the time of said pretended incorporation under the laws of the State of New Jersey, none of the [promotors] of said scheme and none

of the owners of the said respective Water plants resided in the State of New Jersey.

And that the said pretended American Water Works Company of New Jersey, failed to comply with the laws of the State of New Jersey, in that its stock was not subscribed for at the times required under the laws of the State of New Jersey; and such stock as was subscribed for was not paid for as required by the laws of the State of New Jersey.

10:—This defendant further answering says that the defendant Company the American Water Works Company of New Jersey, having dissensions in its Board of Directory, certain persons being desirous of obtaining control of the property, caused to be instituted certain legal proceedings in this Court and also in the Court of Chancery of the State
161 of New Jersey, for the purpose of preventing the application of the earnings of the water company to the payment of said coupons, with the ultimate aim of bringing about a default in the payment of such coupons so that a foreclosure might be brought about, and by means of such foreclosure to enable certain of the stockholders, and certain of the holders of the bonds to obtain the title to and possession of the water plant to the exclusion of a large number of other stockholders and bondholders equally interested in the preservation of the water plant, and equally interested in the prevention of foreclosure.

11:—This defendant further says that as a part of said scheme to bring about the present attempted foreclosure, a commit-ee was organized by certain dissatisfied stockholders and bondholders, to obtain the control of certain of the bonds and coupons with a view to this foreclosure proceeding. That said Committee was and is composed of seven persons, of whom Roswell G. Rolston the president of the complainant Company is one. The said committee devised and issued and caused to be circulated among the bondholders certain circulars requesting them to surrender their bonds and coupons to said Committee and requiring the owners and holders of said bonds and coupons to submit to an assessment of a considerable sum of money to be paid into the hands of said Committee, under the pretense or claim of raising a fund to pay the expenses of protecting the interests of said bondholders, and which said circulars contained a further in-uendo or threat to the effect that if said bondholders submitted not their bonds and coupons to said Committee or to the Complainant company that they would forfeit their rights under the said mortgage, and that under and by virtue of said proceed-

162 ings, i-nuendos and threats the complainant company was enabled to obtain possession or control of certain of said bonds and certain of said unpaid coupons to the limited amount hereinbefore set forth, and that the Complainant company when called upon by certain of the stockholders and bondholders to disclose what persons, if any, being bondholders, had requested of the Complainant Company to declare a default and to bring a foreclosure proceeding, declined to make such disclosure [or] what persons if any had so requested said default or said foreclosure. Wherefore, defendant charges upon information and belief that the declaration of default, if any, has been made, by the Complainant company, and said determination of said complainant Company to file its bill of foreclosure has not been done in the interests of the bondholders, but has been in the interest and at the solicitation of the said Committee above referred to, and which was organized as this defendant is informed and believes to secure a personal advantage to themselves or those represented by them under their procurement as aforesaid, and to the disadvantage and against the wish of a majority of the holders of the bonds and coupons. Wherefore this defendant charges that this foreclosure proceeding is unjust and inequitable, and is contrary to, and unwarranted by the provisions and stipulations in the said mortgage in that behalf.

12:—This defendant further answering denies E. Hydge Rust is in possession of any of the property or franchises covered by the said mortgage, but upon the contrary aver that under and by virtue of an order issued out of this Court, said E. Hyde Rust has been removed as receiver of said property, and that said E. Hyde Rust has not been exercising as such Receiver any control over said property for a long time prior to the filing of the bill of complaint herein, and that this answering defendant was, by an order issued out of this Court, appointed receiver of all the property covered by said mortgages, and

163 that he duly qualified and entered upon his duties as such receiver and has not been removed or discharged from his said trust.

And this defendant denies that the said E. Hyde Rust has any right to the possession or control of any part of the property covered by said mortgage under and by virtue of any order whatsoever issuing out of said Court of Chancery in the State of New Jersey, or under and by virtue of any order issued out of this Court, in the suit of The Denver City Water Works Company, et al. vs. The American Water Works Company, et al. referred to in any of the several divisions of paragraph 20 of the Bill of Complaint.

13:—This defendant further answering says, that if he had been permitted and was now permitted, without the interference of the Complainant Company and of said Committee, in the interest of whom the Complainant Company is acting, to receive, use and apply the moneys now on hand, and the revenues and receipts from said water plant to the payment and discharge of maturing coupons this defendant could at all times and could now pay, discharge and take up all outstanding coupons and preserve, maintain, and operate said water plant for the use and benefit of the City of Omaha, as in said contract between the City of Omaha and Sidney E. Locke is provided, and further says that such a preservation of the said water plant by the defendant companies would best subserve the interests of all concerned. Wherefore, defendant charges and avers that such orders and decrees in that behalf should be entered herein in case the Bonds are held to be rated obligations as would provide for the taking up and discharge of said coupons, and as should preserve the said water plant to the defendant companies, and in that behalf that the prayer for the foreclosure of the said mortgage should be denied.

14:—And this defendant further answering denies that the said complainant is entitled to the relief or any part thereof, in the said complaint demanded. And this defendant
164 prays the [the] same advantage of this his answer as if he had pleaded or demurred to the said Bill of Complaint. And this defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. B. HUNT,
Temporary Receiver,

by JNO. L. WEBSTER,
his Solicitor.

JNO. L. WEBSTER,
Of Counsel.

Upon the back of said Answer appear endorsements in the words and figures following, to-wit:—

No. 96 Q. United States Circuit Court, District of Nebraska. Farmer's Loan & Trust Company, vs. American Water Works Co. et al. Answer of A. B. Hunt, Receiver. Filed Dec. 4, 1894. Elmer D. Frank, Clerk. Jno. L. Webster, Solicitor.

Thereupon afterwards, to-wit:—On the 21st day of December, 1894, Testimony on behalf of all parties was filed in said

case, which said Testimony is in the words and figures following, to-wit:—

In the Circuit Court of the United States, District of Nebraska.

The Farmer's Loan & Trust Company, Complainant,
96 Q. vs.
The American Water Works Company of Illinois, et al. Respondents.

Testimony in behalf of Complainant and Respondents, taken before E. S. Dundy, Jr., Master & Examiner in Chancery, at Omaha, New York City and Boston, on July 19, 1894, and other dates as hereinafter shown.

165 Appearances:—For complainant, Messrs. Turner, McClure & Rolston and Frederick Geller; For Respondents, Jno. L. Webster; For Receivers, R. S. Hall;

Omaha, Nebraska, Thursday July 19, 1894, 3 o'clock P. M.

Testimony taken in behalf of the defendants The American Water Works Company of Illinois and The American Water Works Company of New Jersey, before E. S. Dundy, Jr., Master and Examiner in Chancery; said testimony being taken at the office of John L. Webster, in the City of Omaha, by consent of parties, the Complainant being represented by its Solicitor, Richard S. Hall, and the defendants by their Solicitor, John L. Webster.

The defendants offer in evidence the Articles of Incorporation of the American Water Works Company (of Illinois), and the same is offered to the Examiner for the purpose of taking a copy thereof, and the defendant gives notice that the certified copy will be presented in open Court at the hearing.

Objected to by Mr. Hall as incompetent, irrelevant and immaterial.

Said Articles of Incorporation are marked Exhibit 1, of which the following is a Copy.

EXHIBIT I. (Copy)

Amount fees paid, $.....

State of Illinois,
Cook County —ss.

To Henry D. Dement, Secretary of State:

166 We, the undersigned, Henry I. Beer, Harvey L. Hopkins and Joseph A. Griffin, propose to form a Corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning Corporation," approved

April 18, 1872, and all acts amendatory thereof; and for the purpose of such organization, we hereby state as follows, to-wit:—

1: The name of such Corporation is "The American Water Works Company."

2: The object for which it is formed is to build, equip and operate works to supply water to cities, towns, villages and municipal and other corporations; to acquire by purchase, lease or otherwise, such works and operate them, and to deal in the stocks and bonds of other corporations and associations organized for a similar purpose. The business to be carried on in this State and elsewhere.

3: The Capital Stock shall be Six Hundred Thousand Dollars ($600,000.)

EXHIBIT I. (Copy)

4. The amount of each share is One Hundred Dollars ($100)

5: The number of shares is Six Thousand (6,000)

6: The location of the principal office is in Chicago, in the County of Cook, State of Illinois.

7: The duration of the Corporation shall be ninety-nine years.

HENRY I. BEER,
HARVEY L. HOPKINS,
JOSEPH A. GRIFFIN.

State of Illinois,
County of Cook —ss.

167 I, Ada M. Lowrie, a Notary Public, in and for the County and State aforesaid, do hereby certify that on the 29th day of March, A. D. 1887, personally appeared before me, Henry I. Beer, Harvey L. Hopkins, and Joseph A. Griffin, to me personally known to be the same persons who executed the foregoing statement, and severally acknowledged that they executed the same for the purpose therein set forth.

EXHIBIT I. (Copy)

In Witness Whereof, I have hereunto set my hand and seal the day and year above written.

ADA M. LOWRIE,
Notary Public.

[Seal]

(Filed Mar. 30, 1887. Henry D. Dement, Sec'y of State.

EXHIBIT I. (Copy.)

State of Illinois, Department of State.

Henry D. Dement, Secretary of State.

To all whom these presents shall come—Greeting:

Whereas, it being proposed by the persons hereinafter named, to form a corporation, under an Act of the General Assembly of the State of Illinois, entitled "An Act concerning Corporations" approved April 18th, 1872, in force July 1st 1872, and the amendments thereto, the objects and purposes of which Corporation are set forth in a statement duly signed and acknowledged according to law, and this day filed in the office of the Secretary of State.

168 Now Therefore, I, Henry D. Dement, Secretary of State of the State of Illinois, by virtue of the power vested in and the duties imposed upon me by law, do hereby authorize, empower and license Henry I. Beer, Harvey L. Hopkins and Joseph A. Griffin, the persons whose names are signed to the before mentioned statement, as Commissioners to open books for subscription to the capital stock of, The American Water Works Company, such being the name of the proposed Corporation as contained in the statement, at such times and places as the said Commissioners may determine.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield, this Thirtieth day of March, in the year of our Lord, one Thousand eight hundred and eighty-seven, and of the Independence of the United States the one [one] hundredth and 11th.

[Seal.]

HENRY D. DEMENT,
Secretary of State.

EXHIBIT I. (Copy)

To Henry D. Dement, Secretary of State of the State of Illinois.

The Commissioners duly authorized to open books of Subscription to the Capital Stock of The American Water Works Company pursuant to license heretofore issued, bearing date the 30th. day of March A. D. 1887, do hereby report that they opened Books of Subscription to the Capital Stock of said Company, and that the said Stock was fully subscribed; that the following is a true copy of such subscription, viz: We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the Capital Stock

of the American Water Works Company, and we severally agree to pay the said Company, for each share, the sum of One Hundred Dollars, payable as the Directors of said Com-
169 pany shall direct.

Name.	Shares.	Amount. Dollars.	Cents.
Harvey L. Hopkins,	5990	599000	00
Frederic W. Short,	5	500	00
Edmund G. Short per F. W. Short	5	500	00

That on the Eleventh day of April, A. D. 1887, at Room 619, Number 218, La Salle Street, in Chicago, Illinois, at the hour of Two o'clock P. M., they convened a meeting of the subscribers aforesaid, pursuant to notice required by law, which said notice, was deposited in the post [ooffice], properly addressed to each subscriber ten days before the time fixed therein, a copy of which said notice is as follows, to-wit:—
To (name of subscriber)

You are hereby notified that the Capital Stock of The American Water Works Company has been fully subscribed, and that a meeting of the subscribers to the Capital Stock of said Company will be held at Room 619, Number 218 La Salle Street, in Chicago, Illinois, on the eleventh day of April, A. D. 1887, at two o'clock P. M. for the purpose of electing a Board of Directors, and completing the organization of said Company, and for the transaction of such other business as may be deemed necessary.

Signed:

HENRY I. BEER,
HARVEY L. HOPKINS,
JOSEPH A. GRIFFIN,
Commissioners.

That said subscribers met at the time and place in said notice specified, and proceeded to elect Directors, and that the following persons were duly elected for the term of one year viz:—Harvey L. Hopkins, Frederic W. Short and
170 Joseph A. Griffin.

HENRY I. BEER,
HARVEY L. HOPKINS,
JOSEPH A. GRIFFIN,
Commissioners.

State of Illinois,
County of Cook —ss.

On this 11th. day of April, A. D. 1887, personally appeared before me, a Notary Public in and for said County, in said State, Henry I. Beer, Harvey L. Hopkins, and Joseph A. Grif-

fin, and made oath that the foregoing report by them subscribed is true in substance and in fact.

ADA M. LOWRIE,
Notary Public.

[Seal] Filed April 12. Henry D. Dement, Sec'y of State.

State of Illinois, Department of State.

Henry D. Dement, Secretary of State.

To all to whom these presents shall come—Greeting:—

Whereas, a Statement duly signed and acknowledged, has been filed in the office of the Secretary of State, on the 30th. day of March, A. D. 1887, for the organization of the American Water Works Company, under and in accordance with the provisions of "An Act Concerning Corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto at-
171 tached.

And whereas, a License has been issued to Henry I. Beer, Harvey L. Hopkins and Joseph A. Griffin. as Commissioners to open books for subscription to the Capital Stock of the said Company.

And Whereas, the said Commissioners have, on the Twelfth day of April, A. D. 1887, filed in the office of the Secretary of the State a report of their proceedings under said License, a copy of which report is hereto attached.

Now Therefore, I Henry D. Dement, Secretary of State of the State of Illinois, by virtue of the power vested in me by law, do hereby certify that the said, The American Water Works Company, is a legally organized corporation, under the laws of this State.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield, this 12th day of April, in the year of our Lord One Thousand Eight Hundred and eighty-seven and of the Independence of the United States the One hundred and 11th.

[Seal]

HENRY D. DEMENT,
Secretary of State.

United States of America,
State of Illinois—ss.

Office of Secretary.

I, Henry D. Dement, Secretary of State of the State
172 of Illinois, do hereby certify that the foregoing is a

true copy of the articles on incorporation of "The American Water Works Company," the original of which is now on file in this office.

In Witness Whereof, I hereto set my hand and affix the Great seal of State, at the City of Springfield, this 30th day of January, A. D. 1888.

[Seal]

HENRY D. DEMENT,
Secretary of State.

Defendants offer in evidence a copy of the report of J. D. Cook to the City Council of the City of Omaha, submitting a plan for the construction of a water plant, and which report was filed in the office of the City Clerk May 31, 1880, and approved by the City Council June 8, 1890. Which is marked Deft's Exhibit "2."

Objected to by Mr. Hall as incompetent, irrelevant and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the objection that it is a copy is hereby waived.

The following is a copy of the report of J. D. Cook offered by the defendants:

DEFENDANT'S EXHIBIT "2"

"Water Works.

Engineer Cook's Report.

To the Honorable City Council, Omaha, Nebraska;

Gentlemen:—As instructed by your special Committee, I have had under consideration the subject of water supply for your City, and herewith respectful-y submit the result, with such suggestions and recommendations as are deemed most conducive to your present and prospective needs.

173 The unusual width of your streets, and their near proximity to each other, necessitates a comparatively unusual aggregate length of pipe distribution. Many streets seem so nearly equal in importance, demanding equal protection and supply, that any discrimination is manifestly unjust. Population as compared with territorial area tends to a still further complication of the problem.

While it is an important desideratum to supply and protect to the greatest attainable extent your more sparsely settled suburban districts, it may not be proper to overlook the equity of conferring the greatest benefits upon the greatest number,

by ignoring all estimates and comparisons of cost with resulting benefits.

In adverting to these questions I deem it unimportant whether the works are to be constructed and owned by the City or by a private company, under a franchise contemplating a stipulated annuity to be paid by the City. The same considerations, such as safety, efficiency and capacity are equally pertinent in either case. With equal benefits, public and private, it matters little to the tax payer whether the City pays interest on bonded indebtedness or an equivalent amount annually to a private Company. The City, however, is directly interested in having such works as will adequately meet all ordinary public exigencies and private needs—In immunity from unreliable machinery—from frequent and extensive repairs—from inefficiency in pipe and hydrant distribution and from avoidable interruptions of every nature.

Underlying the success of a public water supply, especially when it is contemplated to depend upon direct hydrant pressure for fire service, is the necessity for a judicious pipe distribution. The transmission of pressure to points remote from the source of power, and its steady maintenance while discharging sufficient water to subdue conflagrations, can-
174 not be safely accomplished excepting through a pipe distribution of adequate diameter and arrangement. Gravity pressure is wholly dependent upon the altitude of reservoir or fountain head, and the loss by friction irreparable, and when overcome by direct pumping an excessive strain is frequently imparted to the distribution, endangering service pipes, house plumbing, etc. So that in either case a pipe distribution of liberal capacity is the surest, if not the only method of safely meeting such variable service.

Entire dependence upon hydrants for fire service is of comparatively modern origin, and in large, densely populated cities, can scarcely be considered a safe reliance—the friction caused by water permeating a pipe distribution some extensive and miscellaneous—through pipes of different diameter and at variable velocity [necessities] an immense initial pressure.

In New York, and perhaps some other of our larger cities, the depletion incident to daily supply alone has been found so great as to leave little or no pressure at and near the ends of long, and even large, water mains. For the same reason it has been found in many cities that reliability upon direct hydrant service is diminished about inversely as the demand for current supply increases.

In a prosperous and growing city, such as Omaha, these questions are well worthy of most intelligent consideration.

Admonished by the fact that many cities are almost constantly being compelled to take up small pipes and replace them with others of greater capacity, you cannot safely afford to overlook such an essential pre-requisite to successful future results.

The following statement, [complied] from standard authority may be found of interest in illustrating some of the general laws pertaining to pipes and their comparative capacity, frictional resistance, etc.:

[175]

Table showing comparative distances that pipes of different diameters will discharge equal quantities of water under 200 feet head of an initial pressure of eighty-seven pounds:

Size of pipe.	Gallons discharged per minute.	Length of Pipe in Feet.	
4 inches	468	1,000	Total Capacity of Pipe.
6 "	468	7,420	" " " "
6 "	1,200	1,000	" " " "
8 "	1,200	4,776	" " " "
8 "	2,640	1,000	" " " "
10 "	2,640	3,081	" " " "
10 "	4,640	1,000	" " " "
12 "	4,640	2,425	" " " "
12	7,200	1,000	" " " "
14 "	7,200	2,183	" " " "
14 "	10,560	1,000	" " " "
16 "	10,560	1,974	" " " "
16 "	14,760	1,000	" " " "
18 "	14,760	1,827	" " " "
18 "	19,920	1,000	" " " "
20 "	19,920	1,693	" " " "
20 "	25,920	1,000	" " " "
24 "	25,920	2,488	" " " "

For convenience of reference, I have also tabulated the suggested pipe distribution for your City as follows:

PIPE DISTRIBUTION.

[176]

Size Inches.	On Street.	From Street.	To Street.	Length in feet.
24	Poppleton	Delaware	Catherine	700
24	Catherine	Poppleton	Mt. Pleasant Av.	650
24	Mt. Pleasant Av.	Catherine	Colfax	200
24	Colfax	Mt. Pleasant Av.	Coburn	1,350
24	Coburn	Colfax	Sheridan	1,300
				4,200
20	Sheridan	Coburn	St. Mary's	400
20	St. Mary's	Sheridan	Twentieth	2,700
				3,100
18	St. Mary's	Twentieth	Seventeenth	1,100
18	Howard	Seventeenth	Fifteenth	700
				1,800
16	Izard	Eighth	Twenty-first	4,700
16	Twenty-first	Izard	Davenport	2,700
16	Davenport	Twenty-first	Jefferson	850
16	Jefferson	Davenport	Farnam	1,500
16	Farnam	Jefferson	Fairview	800
17	Fairview	Farnam	St. Mary's	1,400
16	St. Mary's	Fairview	Sheridan	500
16	Sheridan	St. Mary's	Coburn	450
16	Coburn	Sheridan	Colfax	1,300
16	Colfax	Coburn	Mt. Pleasant Av.	1,350
16	Mt. Pleasant Av.	Colfax	Delaware	900
16	Delaware	Mt. Pleasant Av.	Poppleton	650
16	Poppleton	Delaware	Liberty	400
16	Howard	Thirteenth	Fifteenth	750
16	Fifteenth	Dodge	Howard	1,540
				19,790
14	Sixteenth	Izard	Dodge	3,450
12	Howard	Tenth	Thirteenth	1,100
12	Tenth	Howard	Leavenworth	1,160
12	Dodge	Thirteenth	Sixteenth	1,100
				3,030
10	Tenth	Leavenworth	Mason	750
10	Tenth	Howard	Dodge	1,540
10	Dodge	Sixteenth	Eighteenth	740
				3,360

[177]

[FIRE] DISTRIBUTION—Continued.

Size Inches.	On Street.	From Street.	To Street.	Length in Feet.
8	Howard	Eighth	Tenth	750
8	Sixth	Pierce	Division	400
8	Seventh	Pacific	Pierce	380
8	Tenth	Mason	Pierce	760
8	Twelfth	California	Chicago	760
8	Thirteenth	Chicago	Leavenworth	3,790
9	Fifteenth	Howard	Jackson	380
8	Sixteenth	Izard	Clark	2,200
8	Seventeenth	Dodge	Farnam	780
8	Eighteenth	Dodge	Douglas	380
8	Twenty-third	Cuming	Webster	760
8	Twenty-third	California	Chicago	760
8	Saunders	Cuming	Hamilton	1,440
8	Cuming	Twenty-third	Saunders	200
8	Webster	Twelfth	Twenty-third	3,600
8	Chicago	Thirteenth	Twenty-third	3,970
8	Chicago	Twenty-third	Twenty-fourth	430
8	Dodge	Tenth	Thirteenth	1,100
8	Dodge	Eighteenth	Twentieth	700
8	Farnam	Ninth	Fifteenth	2,200
8	Mason	Tenth	Thirteenth	1,100
8	Pacific	Seventh	Tenth	1,100
8	Pierce	Sixth	Seventh	3,600
8	Division	Fifth	Sixth	360
				28,660
6	Fourth	Walnut	Pine	750
6	Fifth	Division	Spruce	750
6	Sixth	Division	Spruce	750
6	Park Wilde	Pierce	Elm	700
6	Eighth	Howard	Jackson	380
6	Ninth	Capitol	Dodge	360
6	Ninth	Douglas	Harney	760
6	Tenth	Chicago	Dodge	1,080
6	Eleventh	Dodge	Howard	1,540
6	Eleventh	Cass	Davenport	750
6	Twelfth	Capitol	Jackson	2 280
6	Thirteenth	Webster	Chicago	1,150
6	Thirteenth	Mason	Pierce	780
6	Fourteenth	Burt	California	780
6	Fourteenth	Capitol	Howard	1,900
6	Fifteenth	Cuming	Burt	380
6	Fifteenth	Cass	Dodge	1,460
6	Fifteenth	Jackson	Marcy	1,150
6	Sixteenth	Clark	Spruce	1,950
6	Sixteenth	Leavenworth	Marcy	380

[178]

PIPE DISTRIBUTION—(Continued).

Size Inches.	On Street.	From Street.	To Street.	Length in Feet.
6	Eighteenth	Chicago	Cuming	1,830
6	Eighteenth	Farnam	Harney	380
6	Eighteenth	St. Mary's	Leavenworth	950
6	Twentieth	Cuming	California	1,160
6	Twentieth	Cass	Davenport	750
6	Twentieth	Capitol	Dodge	360
6	Twentieth	Douglas	Farnam	400
6	Twentieth	St. Mary's	Leavenworth	700
6	Twenty-second	California	Cass	380
6	Twenty-second	Capitol	Dodge	380
6	Twenty-fourth	California	Dodge	1,840
6	Twenty-fifth	Davenport	Capitol	350
6	Center	Cuming	Hamilton	
6	Campbell	Cuming	Hamilton	1,450
6	Spruce	Sixteenth	Eighteenth	650
6	Hamilton	Saunders	Campbell	1,326
6	Cuming	Fifteenth	Sixteenth	370
6	Cuming	Twentieth	Twenty-third	1,060
6	Cuming	Saunders	Center	1,280
6	Burt	Fourteenth	Fifteenth	350
6	California	Twelfth	Thirteenth	360
6	California	Twenty-second	Twenty-fourth	800
6	Cass	Eleventh	Twelfth	360
6	Cass	Twentieth	Twenty-third	1,060
6	Chicago	Tenth	Twelfth	760
6	Davenport	Twenty-fourth	Twenty-fifth	600
6	Capitol	Sixteenth	Twentieth	1,450
6	Capitol	Twenty-second	Twenty-fifth	1,400
6	Dodge	Ninth	Tenth	370
6	Dodge	Twentieth	Twenty-fourth	1,500
6	Douglas	Ninth	Twentieth	400
6	Farnam	Fifteenth	Twentieth	1,800
6	Harney	Fifteenth	Eighteenth	1,100
6	Jackson	Seventh	Tenth	1,080
6	Leavenworth	Thirteenth	Sixteenth	1,100
6	Marcy	Fifteenth	Sixteenth	350
6	Pierce	Seventh	Thirteenth	2,190
6	Walnut	Fourth	Fifth	360
6	Spruce	Fourth	Sixth	700
				35,330
4	Cuming	Sixteenth	Twentieth	1,450
4	Burt	Fifteenth	Twenty-third	2,870
4	California	Thirteenth	Twenty-second	3,250
4	Cass	Twelfth	Twentieth	2,900
4	Davenport	Tenth	Twentieth	3,630
4	Capitol	Ninth	Sixteenth	2,350
4	Harney	Ninth	Fifteenth	2,200
4	Jackson	Tenth	Eighteenth	2,940
4	Leavenworth	Eighteenth	Twentieth	640
4	Pacific	Tenth	Thirteenth	1,100
				23,530

179 Further and more careful examination may indicate desirable [charges] in foregoing distribution, and several additions will also doubtless be found worth- of favorable consideration. I have accordingly included in the general estimate three miles of six inch pipe to be located hereafter.

The four-inch pipe as located will be reinforced by larger parts at short intervals, and will thus be comparatively equal to other and larger sizes. When intended for use in fire service it will be connected to the hydrant by a six inch pipe, so as to supply the hydrant with the full capacity of two four-inch pipe.

As you contemplate depending largely or wholly upon hydrant pressure for fire protection, and as any increase of pressure to counteract frictional loss in long lines of hose will be impossible with reservoir service, and always more or less objectionable with direct pumping, I recommend a liberal and plentiful distribution of hydrants; that they [—] placed not over four hundred feet apart, especially in the more thickly [—] portions of the City. There is a manifest economy—as well as an almost incredible difference in efficiency—between six-inch pipe and two-and-a-half-inch hose. Under two hundred head and through 100 feet of hose a one-and-a-quarter-inch nozzle will discharge 289 gallons of water per minute, and lose by friction thirty pounds, while a loss for a similar discharge through 100 feet of six inch pipe would be less than four-tenths of one pound, or a loss of head 71 6-10 and 1 52-100 feet respectively. The total cost of six-inch pipe laid should not exceed eighty-(80) cents per foot, while the cost of four-ply rubber hose would not be less than one ($1) dollar per foot; the hose having the advantage of portability, and the pipe the advantage of durability; the city paying cash for hose and interest on the pipe, the average [life] of hose being, say,
180 five years, and the pipe practically indestructible.

The annexed table, which is in the main a record of practical tests, will more fully illustrate this vitally important natural law, and furnish a plain and demonstrable argument in favor of liberality in your hydrant distribution.

LOCATION OF HYDRANT.

For number and location of hydrants as recommended, I submit the following table:

1:—Fourth, corner Pine; 2, Fourth, corner Spruce; 3, Fourth corner Walnut; 4, Fifth, corner Spruce; 5, Fifth corner Walnut; 6, Fifth corner Division; 7, Sixth, corner Spruce; 8, Sixth, corner Walnut; 9, Sixth, corner Division; 10, Sixth, corner Pierce;

11, Seventh, corner Pierce; 12, Seventh, corner Pacific; 13, Park Wilde, Corner Elm; 14, Park Wilde, between Pierce and Elm; 15, Eight, corner Howard; 16, Eighth, corner Jackson; 17, Eighth, corner Pacific; 18, Eighth, corner Pierce; 19, Ninth, corner Capitol Avenue; 20, Ninth, corner Dodge; 21, Ninth, corner Douglas; 22, Ninth, corner Farnam; 23, Ninth corner Howard; 24, Ninth, corner Jackson; 25, Tenth, corner Chicago; 26, Tenth, corner Davenport; 27, Tenth, corner Capitol Avenue; 28, Tenth, corner Dodge; 29, Tenth, corner Douglas; 30, Tenth, corner Farnam; 31, Tenth, corner Harney; 32, Tenth, corner Howard; 33, Tenth corner Jackson; 34, Tenth, corner Jones; 35, Tenth, corner Leavenworth; 36, Tenth, corner Marcy; 37, Tenth, corner Mason; 38, Tenth, corner Pacific; 39, Tenth, corner Pierce; 40, Eleventh, corner Cass; 41, Eleventh, corner Chicago; 42, Eleventh, corner Davenport; 43, Eleventh, corner Capitol Avenue; 44, Eleventh, corner Dodge; 45, Eleventh, corner Douglas; 46, Eleventh, corner Farnam; 47, Eleventh, corner Harney; 48, Eleventh, corner Howard; 49, Eleventh, corner Jackson; 50, Eleventh, corner Mason; 51, Eleventh, corner Pacific; 52, Eleventh, corner Pierce; 53, Twelfth, corner California; 54, Twelfth, corner Cass; 55, Twelfth, corner Chi-
181 cago; 56, Twelfth, corner Davenport; 57 Twelfth corner Capitol Avenue; 58, Twelfth, corner Dodge; 59, Twelfth, corner Douglas; 60, Twelfth, corner Farnam; 61, Twelfth, corner Harney; 62, Twelfth, corner Howard; 63, Twelfth, corner Jackson; 64, Twelfth, corner Mason; 65, Twelfth, corner Pacific; 66, Twelfth corner Pierce; 67, Thirteenth, corner Webster; 68, Thirteenth, corner California; 69, Thirteenth, corner Cass; 70, Thirteenth, corner Chicago; 71, Thirteenth, corner Davenport, 72, Thirteenth, corner Capitol Avenue, 73, Thirteenth, corner Dodge; 74, Thirteenth, corner Douglas; 75, Thirteenth, corner Farnam; 76, Thirteenth, corner Harney; 77, Thirteenth, corner Howard; 78, Thirteenth, corner Jackson; 79, Thirteenth corner Jones; 80, Thirteenth, corner Leavenworth; 81, Thirteenth, corner Mason; 82, Thirteenth, corner Pacific; 83 Thirteenth, corner Pierce; 84, Fourteenth, corner Burt; 85, Fourteenth, corner Webster; 86, Fourteenth, corner California; 87, Fourteenth corner, Cass; 88, Fourteenth corner Chicago; 89, Fourteenth, corner Davenport; 90, Fourteenth, corner Capitol Avenue; 91, Fourteenth, corner Dodge; 92, Fourteenth, corner Douglas; 93, Fourteenth, corner Farnam; 94, Fourteenth, corner Harney; 95, Fourteenth, corner Howard; 96, Fourteenth, corner Jackson; 97, Fourteenth, corner Leavenworth; 98, Fifteenth, corner Cuming; 99, Fifteenth, corner Burt; 100, Fifteenth corner Webster; 101, Fifteenth, corner California; 102, Fifteenth, corner Cass; 103, Fifteenth, corner Chicago; 104, Fifteenth, corner Davenport; 105, Fifteenth, corner

Capitol Avenue; 106, Fifteenth corner Dodge; 107, Fifteenth, corner Douglas; 108, Fifteenth corner Farnam; 109, Fifteenth, corner Harney; 110, Fifteenth, corner Howard; 111, Fifteenth, corner Jackson; 112, Fifteenth, corner Jones; 113, Fifteenth, corner Leavenworth; 114, Fifteenth, corner Marcy; 115, Sixteenth, corner George Smith's; 116, Sixteenth corner Grace; 117, Sixteenth, corner Clark; 118, Sixteenth, corner Sherman; 119, Sixteenth, corner Nicholas; 120, Sixteenth, corner Izard; 121, Sixteenth, corner Cuming; 122, Sixteenth, corner Burt; 123, Sixteenth, corner Webster; 124, Sixteenth, corner
182 California; 125, Sixteenth, corner Cass; 126, Sixteenth, corner Chicago; 127, Sixteenth, corner Davenport; 128, Sixteenth, corner Capitol Avenue; 129, Sixteenth, corner Dodge 130, Sixteenth, corner Douglas; 131, Sixteenth, corner Farnam; 132, Sixteenth, corner Harney; 133, Sixteenth, corner Howard; 134, Sixteenth, corner Jackson; 135, Sixteenth, corner Leavenworth; 136, Sixteenth, corner Marcy; 137, Seventeenth, corner Izard; 138, Seventeenth, corner Cuming, 139, Seventeenth, corner Burt; 140, Seventeenth, corner Webster; 141, Seventeenth, corner California; 142, Seventeenth, corner Cass; 143, Seventeenth, corner Chicago; 144, Seventeenth, corner Davenport; 145, Seventeenth, corner Capitol Avenue; 146, Seventeenth, corner Dodge; 147, Seventeenth, corner Douglas, 148, Seventeenth, corner Farnam; 149, Seventeenth, corner Harney; 150, Seventeenth, corner Howard; 151, Seventeenth, corner Jackson; 152, Eighteenth, corner Spruce; 153, Eighteenth, corner Izard; 154, Eighteenth corner Cuming; 155, Eighteenth, corner Burt; 156, Eighteenth, corner Webster; 157 Eighteenth, corner California; 158, Eighteenth, corner Cass; 159, Eighteenth, corner Chicago; 160, Eighteenth, corner Davenport; 161, Eighteenth, corner Capitol Avenue; 162, Eighteenth, corner Dodge; 163, Eighteenth, corner Douglas; 164, Eighteenth, corner Farnam; 165, Eighteenth, corner Harney; 166, Eighteenth, corner St. Mary's; 167, Eighteenth, between Jackson and Leavenworth; 168, Eighteenth, corner Leavenworth; 169, Nineteenth, corner Izard; 170, Nineteenth, corner Cuming; 171, Nineteenth, corner Burt; 172, Nineteenth corner Webster; 173, Nineteenth, corner California; 174, Nineteenth, corner Cass; [174,] Nineteenth corner Chicago; 176, Nineteenth, corner Davenport; 177, Nineteenth, corner Capitol Avenue; 178, Nineteenth, corner Dodge; 179, Nineteenth corner Farnam; 180, Nineteenth, corner St. Mary's; 181, Nineteenth, corner Leavenworth; 182, Twentieth, corner Izard; 183, Twentieth, corner Burt;
183 184, Twentieth corner Cuming; 185, Twentieth, corner Webster; 186, Twentieth, corner California; 187, Twentieth, corner Cass; 188, Twentieth, corner Chicago; 189, Twentieth corner Davenport; 190, Twentieth, corner Capitol Avenue;

191, Twentieth, corner Dodge; 192, Twentieth, corner Douglas; 193, Twentieth, corner Farnam; 194, Twentieth, corner St. Mary's; 195, Twentieth, corner Leavenworth; 196, Twenty-first, corner Izard; 197, Twenty-first, corner Cuming; 198, Twenty-first, corner Burt; 199, Twenty-first, corner Webster; 200, Twenty-first, corner California; 201, Twenty-first, corner Cass; 202, Twenty-first, corner Chicago; 203, Twenty-first, corner Davenport; 204, Twenty-second, corner Cuming; 205, Twenty-second, Corner, Burt; 206, Twenty-second corner Webster; 207, Twenty-second, corner California; 208, Twenty-second, corner Cass; 209, Twenty-second, Corner Chicago; 210, Twenty-second, corner Davenport; 211, Twenty-second, corner Capitol Avenue; 212, Twenty-second, corner Dodge; 213, Twenty-third, corner Cuming; 214, Twenty-third, corner Burt; 215, Twenty-third, corner Webster, 216, Twenty-third, corner California; 217, Twenty-third, corner Chicago; 218, Twenty-third, corner Davenport; 219, Jefferson, corner Capitol Avenue; 220, Jefferson, corner Dodge; 221, Jefferson, corner Farnam; 222, Twenty-fourth, corner California; 223, Twenty-fourth, corner Cass; 224, Twenty-fourth, corner Chicago; 225, Twenty-fourth, corner Davenport, 226, Twenty-fourth, corner Capitol Avenue; 227, Twenty-fourth, corner Dodge; 228, Twenty-fifth, corner Davenport; 229, Twenty-fifth, corner Capitol Avenue; 230, St. Mary's corner South Avenue; 231 St. Mary's Corner Convent; 232, St. Mary's, corner Colorado; 233, St. Mary's Corner Nevada; 234, St. Mary's corner Jacobs; 235, St. Mary's corner Sheridan; 236, Saunders, corner Cuming; 237, Saunders, corner Michigan; 238, Saunders, corner Indiana; 239, Saunders, corner Hamilton; 240, Cuming, corner Wheaton; 241, Cuming, corner Division; 242, Cuming, corner Montana; 243, Cuming corner Center; 244, Hamilton, corner Pier; 245, Center, corner Indiana; 246, Campbell, corner Hamilton; 247, Hamilton, corner King;

184 Where longer lines of hose can be made available among low buildings in some of your less important districts, it may be found reasonably safe to diminish the number of hydrants as given above, but as their original cost is comparatively small when compared with public safety, it might prove to be mistaken economy.

Your hydrants should be of large capacity and designed with the view to durability, perfection in working and freedom from the danger of freezing.

In the event that the site selected for reservoirs should be on the summit near Hanscom park, the flow line would be 305 feet above low water mark in the Missouri River, your

source of supply. The average altitude of the plateau embracing the major part of your city, may be taken at about sixty-five feet or 240 feet below the surface of water in reservoirs equal to 104 pounds hydrant pressure, less frictional loss. One hundred pounds pressure at the hydrant would give eighty pounds at the end of 100 feet of hose sufficient to raise a one-inch stream 131 feet high, discharging 219 gallons per minute. The height of the ground or altitude upon which the High School stands is 200 feet above the river. From this point the natural surface descends more or less rapidly in almost every direction, so that the reservoirs so located would afford ample fire pressure for all that portion of the city, as well as all other parts excepting immediately around the reservoirs and a portion of the extreme suburban districts in the southern and perhaps in the Northwestern portions of the City. To meet this contingency, and to render protection more certain on some other elevations an auxiliary force main should be laid on Izard Street from Sixteenth street to the pump station, as hereinafter described. It should be of such diameter as to furnish water under the reservoir pressure equal to the maximum capacity of the pumping machinery; and so connected with valves, etc., at the junction of Izard and Sixteenth Street mains as to permit a reverse flow from the reservoirs to the pumps—through the regular main to Sixteenth street—
185 hence through the auxiliary main to pump, after which it could be forced by direct pumping through regular main to Sixteenth street, and hence into the general distribution. This arrangement would readily permit of increased hydrant pressure, using clear water, and avoid the objectionable necessity of filling the pipes with turbid water from the river. Taking your pumping capacity of [85,000,000] gallons per 24 hours, the reservoirs would furnish water at that rate for one hour without lowering the flow line more than one foot.

In devising for the treatment of Missouri river water I have carefully considered the feasibility of providing preliminary settling reservoirs near the river, to be supplied by natural inflow or a separate pumping apparatus, the former involving great depth and cost, and the latter the more or less objectionable necessity of double pumping—first into the settling basins and afterwards to the distributing reservoirs.

I therefore recommend the use of elevated reservoirs, which can be utilized for the double purpose of storage and subsidence, the only apparent objection being the possible damage to the pumps, and the tendency to clog the force main with sediment. By using double acting plunger pumps and rubber valves no deleterious results could reasonably be anticipated,

excepting increased wear or cutting of plunging rings, the replacing of which would be a comparatively trivial matter either as to detention or cost, and any accumulation in the force main could not do more than reduce its area until increased velocity would prevent further contraction, but with proper arrangements for blowing off at different points and facilities for flooding by back flow from reservoirs, no serious accumulation should be permitted to occur.

The treatment of Missouri river water being a question for which we have little or no precedent, we are left almost wholly to the dictates of theory. Actual experience may render necessary a more elaborate cleansing device, and the influent
186 arrangements should accordingly contemplate the addition hereafter of preliminary settling basins near the river if found necessary. Such an arrangement need necessitate little or no additional cost excepting the actual cost of subsiding basins, their pumping machinery and connections, thus involving simply an extension instead of a revision of the system as above suggested. The first pumping could be done from main pump station, either by the regular auxiliary engine or by a low service engine designed expressly for this purpose, to be situated in regular pump house and supplied with steam from main boilers. It has been abundantly established by experiments that 90 to 95 per cent of the heavier sediments can be removed by settling from one to two hours. The preliminary settling basins therefore need not be very large or expensive. Such a composite arrangement, if ultimately found necessary, affording facilities for both preliminary and final subsidence, ought to remove all reasonable doubts on this important question.

It would be desirable to have three reservoirs, each with a capacity of not less than 3,000,000 gallons with suitable pipes, wells and other devices to render them interchangeable in service, and for removing sedimentary accumulations. With a well matured device, and intelligent attention in after management, most of the sediment could undoubtedly be removed in a semi-liquid state by ordinary drainage, through South or North Omaha creeks, or utilized in filling and bringing into use some of the deep ravines through which the upper waters of these streams flow.

In view of the fact so well established by many experiments, that this water after twenty-four hours subsidence usually becomes almost perfectly limpid, it certainly seems fair to conclude that such a reservoir service ought to render your supply uniformly acceptable.

187 I have also considered carefully the eligibility of the point on the river from which to draw your supply, and recommend that your pump station be located near the eastern terminus of Izard street, and as near the river as may be found practicable. The influent arrangements to consist of a circular cast iron well six feet or more in diameter, to be settled to bed rock, which at this point is some twenty feet below water; it is proposed to place the well on the shore side of the rip-rap and contiguous thereto, with three or more influent pipes passing through to face of rip-rap at different altitudes, to facilitate taking water from near the surface at variable stages of the river. The well to be also connected with the pumps by a suction pipe at least thirty inches in diameter, and the whole to be provided with such valves, manholes, etc., as to render every part accessible and easily cleansed.

The river approaches this point on nearly a due west course, and now occupies what is generally believed to be a stable channel, large expenditures having been made to secure it by the general government, and also by the several railroad companies interested in its perpetuity.

The channel is so far removed from the Northern portion of the City as to be unquestionably beyond the range of deleterious drainage. Near the end of Izard Street it changes to a southerly course and is in the main so thoroughly under control of an efficient system of dykes, rip-rapping, etc., that its stability almost ceases to be problematical.

The contingent danger of sewerage contamination from Council Bluffs having been suggested, I visited that city for the attainment of information on this point, and am fully convinced that no such solicitude can have any reasonable foundation. The established street grade near the Court house in that City, corner of Pearl and Buckingham streets, is 36 6-10 feet above low water in the river at U. P. R. R. Bridge, [of] 36 6-10 feet above the river at outlet at Spring Lake opposite the City. Their lowest street grade is 16 9-10 feet above the same point. In order to properly drain cellars, the top of sewer should be 10 feet below street grade; the shortest distance from the Court house to the river is about two and one-half miles or 13,200 feet. Estimating the fall or descent of sewer grade at a minimum ratio of one foot vertical per 1,000 feet of length would bring the mouth of sewer 23 feet below street grade and six feet below the surface of river at low water, or some 28 feet below high water line, high water frequently reaching an elevation of four to six feet above the

lowest established street grade in the City. In view of which, and the further fact that Council Bluffs can find a cheaper and more feasible system of drainage through Indian creek, which passes into the river at some distance below the U. P. R. R. bridge, I think we have tenable reasons for dismissing all fears of contamination from this source.

The foundations for buildings and machinery should rest on piling driven to the rock, or to refusal, or upon concrete, as more thorough examination may dictate.

The force main to be 16 inches in diameter, extending from pumps to reservoirs as before described. If connected at any intermediate point with the general distribution, the lateral or connecting pipes should be supplied with valves, to be kept closed (excepting in possible emergencies) leaving the entire distribution to be supplied with clear water from the reservoirs.

Your pumping machinery should consist of two engines having an easy aggregate capacity to pump 5,000,000 gallons in twenty-four hours into the reservoirs, with the additional power necessary to increase the pressure when required in fire service on the higher portions of the City; also of boilers having double the necessary capacity to operate the entire machinery without over-crowding or forcing fires.

189 The usual important question of duty or economy in current performance, can only affect the interest of the water company upon whom will devolve the cost of operating the works, and it is therefore not necessarily a legitimate subject of discussion in this respect.

I respectfully refer you to the following general estimates which it is believed will fully cover the cost of the works as herein described, at present rates of labor and material.

Estimate No. 1, contemplates the location of reservoirs near Hanscom Park. Estimate No. 2, contemplates reservoirs of same capacity, with less altitude, to be located on Farnam street near the center of distribution.

ESTIMATE No. 1.

RESERVOIRS, HANSCOM PARK, FLOW LINE THREE HUNDRED AND FIVE FEET.

144,090 lin. feet, or 27 47-100 miles of pipe laid (4,275 tons)	$199,000
72 tons special castings, at $60	4,320
247 fire hydrants, including setting,	12,350
Valves, boxes, vaults and setting,	8,235
Engine and boiler house, smoke stack and connections,	9,500
Two pumping engines, aggregate capacity 5,000,000 gallons per 24 hours, including four return tubular boilers, five feet, four inches in diameter, sixteen feet long all foundations, settings check and foot valves, piping, fitting and every thing necessary to render the pumping service complete,	$30,500
Reservoirs, complete,	30,000
River work and influent connections	10,000
	$303,905
Add for errors, omissions, etc., five per cent	15,195
Total,	$319,100

190

ESTIMATE No. 2.

RESERVOIRS, FARNAM STREET, OPPOSITE FAIRVIEW AVENUE; FLOW LINE TWO HUNDRED AND FIFTY-FIVE FEET.

132,490 lin. feet, or 25 9-100 miles of pipe laid (tons 3,163)	$150,000
70 tons special castings, at $60.	4,200
247 fire hydrants including setting,	12,350
Valves, boxes, vaults and settings,	8,235
Engine and boiler house, smoke stack and connections,	9,500
Two pumping engines, aggregate capacity 5,000,000 gallons per twenty-four hours, including four return tubular boilers 5 ft. 4 in. diameter, 16 ft. long-all foundations, settings check and foot valves, piping, fitting and everything necessary to render the pumping service complete,	30,500
Reservoirs, Complete	49,500
River work and influent connections	10,000
	$274,285
Add for contingencies five per cent,	13,715
Total,	$288,000

The foregoing estimates and recommendations are intended to describe, and contemplate throughout a first-class system of water works. A less elaborate system might furnish you reasonably well for a time, but with your present corporate importance and inevitably great prospective increase, I do not feel justified in recommending with the single view of barely meeting your present needs. I have endeavored to keep the cost as low as possible, consistent with utility; realizing the fact that the works, if constructed, will have to be done by a private company, who will naturally regard the enterprise from a purely financial standpoint, and that a comparison of original cost with the revenues from franchises and all other sources must be the governing element in the negotiation.

191 By placing your reservoir at a less altitude, as set forth in estimate No. 2, the cost can be materially reduced. If sufficient land could be reasonably obtained near this point, you can have a flow line of 255 to 60 feet elevation —fifty-five feet above the High School level—giving ample service for domestic pressure for the entire district covered by present pipe distribution, and deliver water at the highest points in the city, excepting on the heights adjacent to Hanscom park. This could be supplied when necessary, either by a small high service reservoir or by a large standpipe near the main reservoirs. I submit no estimate for real estate in either case, not being sufficiently advised as to values. The Hanscom park reservoirs would occupy one block as now recorded, and the Farnam street reservoirs 350 by 580 or 203,000 square feet.

The practical difference in altitude, when delivering water at the rate of 5,000,000 gallons per twenty-four hours, would be thirty-four feet—the aggregate loss by friction in 4,200 feet of twenty-four inch 3,100 feet of twenty-inch pipe (distance saved by nearer location) being about sixteen feet.

The current cost of operating the works after completion would also be diminished about two ($2) dollars per day, or eight hundred ($800) dollars per annum.

Without further investigation, I am not now prepared to more than correctly advert as above to the leading characteristics of two locations. Your final decision must be subject to cost of real estate, and perhaps other, as yet, unknown contingencies.

The introduction of a public water supply, especially when taken from a running stream, is often beset by a general prejudice against its fitness and a blind adherence to former sources. Well water, being clear and cold, is frequently held

in high esteem, regardless of the age of the well or surroundings, which may unceasingly contaminate its waters.

192 In a deep, porous, soil, such as yours, nothing can be more logical or natural than the proposition, that the well—usually the lowest point about the premises—must necessarily serve in the double capacity of furnishing water to the household and receiving in return many of the most dangerous elements of pollution, from houses, barns, etc., the fact that it continues to furnish clear water cannot be safely taken as an evidence of purity. Modern experience and investigation have served to overturn many time-honored theories; in this regard chemical research has demonstrated the fallacy of looking to wells for the purest waters, and signally exploded the theory that limpidity is to be taken as the standard of purity—that some of the clearest waters are really the most harmful. For instance, the overflow from sewers, excepting in times of rain and flood, is usually as clear as the clearest well water.

Rain water is also often erroneously regarded as the purest attainable source of supply. Impure gases evolved from centers of population, from the combustion of coal, and from the evaporation of surface impurities generally, are largely absorbed and taken in solution by the descending rain, purifying the air and contaminating the water. The countless germs of organic life which are washed from roofs into cisterns also have a constant tendency to impregnate the water with irremediable pollution, excepting by distillation, and having none of the self-purifying attributes of the running stream, cistern water is usually the first to acquire an offensive smell when left covered and quiescent.

On the other hand the Missouri water, although at times unsightly almost beyond comparison carries nothing really harmful either in suspension or solution. It is unequalled anywhere in the rapidity with which its heavy sediments precipitate, and chemistry finds it almost unsurpassed in purity and fitness for all uses, public and private. These considera-

193 tions vastly outweigh all the expense and trouble incident to its clarification, and in this regard it may be justly esteemed in the light of a blessing to all the cities along its shores.

In view of these demonstrable facts, which must ultimately insure a large patronage, coupled with very reasonable cost for works of such perfection and magnitude, you can offer to capitalists a legitimate, safe and remunerative investment.

Respectfully submitted,

J. C. COOK.

Toledo, Ohio, May 20, 1880.

Filed in the office of the City Clerk, May 25, 1880.

Approved by City Council, June 8, 1880.

Attest:

J. F. McCARTNEY, City Clerk.

APPENDIX.

As the result of further examination and conference with the committee, I now suggest the following additional lines of pipe, which it may be fair to estimate as six-inch pipe, although a portion of it may require larger diameter, and perhaps a part of it smaller. As the regular distribution contemplates rather an unusual large amount of eight-i-ch pipe, a little readjustment will readily meet all requirements.

INCREASED DISTRIBUTION.

	Feet
Seventh Street, from Lincoln to Pacific,	1,150
Leavenworth, from Seventh to Tenth	1,090
Pacific, from Sixth to Seventh	360
Pierce, from Fifth to Sixth	360
Fifth, from Pierce to Division	360
Sixth, from Pierce to Pacific	380
Spruce, from Third to Fourth	360
Third, from Spruce to Pine,	380
Pine, from Second to Third,	360
Second from Pine to Chestnut	250
Eleventh, from Pierce to Pacific	380
Tenth, from Pierce to Castellar	4,300
Castellar, from Tenth to Eleventh	360
Eleventh, from Castellar to Martha	500
Martha, from Tenth to Eleventh	360
Thirteenth, from Leavenworth to Mason	770
In Thirteenth, from Pierce to Williams	920
In Williams, from Thirteenth to Fourteenth	380
194 In Fourteenth, from Williams to Pierce	920
In Pierce, from Thirteenth to Fourteenth	380
In Leavenworth, from Sixteenth to Seventeenth	250
In Seventeenth, from Leavenworth to Hickory	3,400
In Eighteenth, from Cuming to Nicholas	760
In Nicholas, from Eighteenth to Nineteenth	360
In Nineteenth, from Nicholas to Cuming	760
In Clark, from Sixteenth to Nineteenth	1,000
In Nineteenth, from Clark to Grace,	600
In Grace, from Sixteenth to Nineteenth	1,000
Total,	22,450

From which deduct distribution as shown in regular report as follows:—

In Jackson street from Seventh to Eighth.....	360
In Fourth, from Spruce to Pine	360
In Pierce, from Tenth to Thirteenth	1,100
In Mason, from Tenth to Thirteenth	1,100
Total,.....	2,920
Actual addition	19,530
Less three miles or 15,840 feet extra pipe as given in regular report	15,840
Actual increase	3,690

This would add to aggregate cost of works about two thousand nine hundred ($2,900) dollars, and increase the total length of pipe distribution, as contemplated in estimate No. 1, to something over twenty-eight miles.

Further conference and examination also indicate the comparative safety of diminishing the hydrant distribution in some of the less important portions of the City, sufficient to supply the added pipe distribution without increasing the aggregate number of hydrants above 250.

I therefore suggest the following distribution or location of hydrants along the added street mains:

Grace and Eighteenth streets, Grace and Nineteenth, Clark and Eighteenth, Clark and Nineteenth, Nicholas and Eighteenth, Nicholas and Nineteenth, Mason and Seventeenth, Pierce and Seventeenth, Williams and Seventeenth, Williams and Thirteenth, Fourteenth at alley between Williams and Pierce, Marcy and Thirteenth, Briggs and Tenth, Hickory
195 and Tenth, Charles and Tenth, Castellar and Tenth, Castellar and Eleventh, Martha and Eleventh, Pacific and Sixth, Pierce and Fifth, Spruce and Third, Chestnut and Second, Leavenworth and Ninth, Leavenworth and Seventh—total Twenty-four. And the removal of the same number from the following points in the original distribution; Howard and Ninth, Jackson and Seventh, Pine and Fourth, Walnut and Fifth, Mason and Eleventh, Mason and Twelfth, Pierce and Twelfth, Burt and Fifteenth, Burt and Seventeenth, Burt and Nineteenth, Burt and Twenty-first, Burt and Twenty-third, Webster and Fourteenth, California and Thirteenth, California and Fifteenth, California [—] Seventeenth, California and Nineteenth, California and Twenty-first, Cass and Twelfth, Chi-

cago and Eleventh, Davenport and Tenth, Pierce and Sixth Spruce and Fourth, St. Mary's and Eighteenth, Twenty-four.

Reference being had to accompanying map, which will fully illustrate complete pipe and hydrant distribution, including all revisions to date.

Respectfully submitted.

J. D. COOK.

Filed in the office of the City Clerk, May 31, 1880.

Approved by City Council, June 8, 1880.

Attest:

J. F. McCARTNEY, City Clerk.

The defendants offer in evidence a copy of an Ordinance of the City Council of the City of Omaha, being Ordinance No. 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska. Which is marked Deft's Exhibit "3."

Objected to by Mr. Hall as incompetent, irrelevant and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the objection that it is a copy is hereby waived.

The following is a copy of said Ordinance No. 423:

DEFENDANT'S EXHIBIT "3."

196 (Ordinance No. 423.)

An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, state of Nebraska.

Be It Ordained by the City Council of the City of Omaha:

Section 1: Any person, company, corporation or association who shall erect, construct and maintain water works upon the principle of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described, and as more fully and at large appears in the report and appendix tables of J. D. Cook, engineer, filed in the office of the City Clerk of the City of Omaha, on the 25th and 31st days of May A. D. 1880, and as finally approved by the City Council of said City on the 8th of June, A. D. 1880, within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said City and the citizens and inhabitants thereof for domestic, mechanical, public and fire purposes, shall have the right of way along, upon and

under the public streets, alleys, public squares, and public places of said City for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company corporation or association, or their assign, shall maintain and operate any such water works, and while constructing the same, upon the terms and conditions hereinafter mentioned.

Sec. 2. The Water supply for all such water works shall be taken direct from the current of the Missouri river at a point or points fairly adapted to the purpose north of the present site of the Omaha Smelting and Refining Works, and above the sewerage of said City of Omaha, and no [filfth] from said sewerage shall be allowed to mix or intermingle with said water supply; and said water, by the best systems of
197 purification and by proper settling reservoirs, shall be settled, cleansed and purified, and shall be good, clear water, suitable [—] culinary and drinking purposes, and not detrimental to the health of those who use it.

Sec. 3:—The pumping machinery of any such water works shall have an easy aggregate capacity to pump at least five million (5,000,000) gallons of water each and every twenty-four hours and shall be increased as the growth of the city and its needs require; and shall have sufficient power to throw at any one time at the elevation of Fourteenth and Farnam streets in said city through one-inch nozzles, eight streams of water, each stream to the height of one hundred and ten feet, and also at any one time, but at a different time from the test aforesaid, at the elevation of the base of the High School Building in said City, through one-inch nozzles four streams of water, each stream to the [heighth] of one hundred feet; and also at any one time, but at a different time from each of the tests aforesaid, two streams of water at the elevation of Eleventh and Pierce streets, two streams of water at the elevation of Fourteenth and Farnam streets, and two streams of water at the elevation of Sixteenth and Grace streets, each stream to the height of one hundred feet. The reservoirs shall have a capacity of at least nine million (9,000,000) gallons of water.

(Amended Ordinance 430.)

Sec. 4. The water mains of any such water works shall be substantially of the sizes and lengths set forth in the report of J. D. Cook, as adopted, heretofore referred to. Said mains to be cast and tested at the expense of the party building said works under the supervision of an experienced foundry inspector, to be appointed by the City of Omaha, shall stand a

pressure of three hundred pounds to the square inch at the foundry where made and one hundred and sixty pounds pressure to the square inch after they are laid in the streets
198 of Omaha, all of said mains to be cast vertically in dry sand.

Sec. 5: The location of none of said mains, pipes, fixtures or hydrants in the public streets, alleys, public squares and public places of said city must interfere with the sewers previously constructed or in process or construction, or with gas pipes previously laid, and must be located without any unnecessary injury or public inconvenience. For the purpose of laying and placing in position said mains, pipes fixtures and hydrants, or to repair, re-lay or change the same, any such person, company or corporation or association, or their assigns, shall have the right to disturb, remove and dig up the surface and materials of the streets, alleys, public [aquares] and public places of said city, while they shall be entitled to said right of way and during the time necessary for said work; Provided, the materials so disturbed shall be replaced carefully without any unnecessary delay at their expense, leaving and keeping said places for one year in as good condition as before, so far as practicable, and shall hold and save the City harmless from any damage resulting from the displacement or replacing of said materials or from the locating, placing or laying of said mains, pipes fixtures and hydrants, or any of them.

Sec. 6. All such water works shall be so constructed, and the mains, pipes and other fixtures thereof so located, placed and laid as to allow of and render feasible the locating, placing erecting and constructing of not less than two hundred and fifty fire hydrants of the latest and most approved patterns and style, and of the most substantial kind, to have two or more nozzles, and be of such sizes as the City Council may require. Said hydrants shall be placed at the points on the public streets of said City designated in the adopted report of J. D. Cook, heretofore referred to, subject to such change of location as the City Council of Omaha may at any time designate;
Provided, that such change shall not be beyond the dis-
199 tribution of the mains of said water works Company, and shall have the capacity and power to afford ample protection to property against fire for a radius of one thousand feet from each and every one of said hydrants without the aid of either steam or hand engines. If the locality of hydrants shall be ordered changed after they have been set under the direction of the City Council, said change of location shall be at the expense of the City. (Amended Ordinance 430.)

Sec. 7. Any person, company, corporation, association or their assigns, who shall construct any such water works shall build substantially fire-proof all buildings and other structures necessary for their machinery, or any apparatus, that may be needed for their legitimate purposes.

Sec. 8: Any person, company, corporation or association or their assigns, who shall construct any such water works shall furnish water to the City of Omaha free of charge for the following purposes, to-wit:—For Hanscom Park a quantity sufficient for the necessary fountains therein, not exceeding four in number, one hydrant for drinking purposes and one for sprinkling purposes in said park, for the public schools of the City of Omaha, drinking water and such further quantity as may be necessary for general use at the same, for ten drinking fountains for both man and beast, to be located along the said water mains or contiguous to the same at suitable points upon the streets of said City as shall be designated by the City council after said water mains are laid in said streets, or while the same are being laid or placed therein, a supply of water adequate to meet the wants of the public, and make said drinking fountains answer the purpose intended, and water for flushing sewers and for sanitary purposes in the washing out of gutters and ditches in the streets and alleys of said City under the control of the board of health of said City.

200 Sec. 9. Before the placing of water mains or pipes upon a street of said city not having an established grade, the grade of said street shall be established.

Sec. 10: Any person, company, corporation or association or their assigns, who shall construct such water works shall furnish water to citizens residing along the line of said mains, or contiguous to the same, at all times when any such water works shall be maintained, at rates which shall not exceed the following tariff, to-wit:—

TARIFF OF WATER RATES.

	Per Annum.
Dwelling houses, not exceeding five rooms	$6.00
Each additional room,	.75
Banks, including one wash basin	10.00
Bakeries, average daily use for each barrel of flour,	3.50
Barber shops, one chair,	5.00
Barber shops, each additional chair	2.50
Bath houses, public, per tub,	$7.00 to 15.00
Bath rooms, private, per tub,	3.50
Bath rooms, each additional tub.	2.00
Blacksmith shop, one fire	3.00
Blacksmith shop, each additional fire	1.50

Building Purpose—Brick Work:

Tempering mortar, and wetting brick per M., kiln count	$	.05
Tempering mortar, per perch of 16½ [cubit] feet		.02
Making Mortar, per M.		.05

Stone Work.

Making mortar, per perch of 16½ cubic feet		.05
Tempering mortar, per perch of 16½ cubic feet		.02

Plastering.

Making mortar, two-coat per 100 square yards		.10
Making mortar, three-coat work, per 100 square yards		.15
Breweries, distilleries, rectifiers and malt houses (estimated at 100 gallons of water used per barrel manufactured) per 1000 gallons		.15
Butchers' stalls and shops	$4.00 to	8.00
Billiard saloon, one table		5.00
Billiard saloon, each additional table,		1.50
Book Bindery,	$10.00 to	15.00
Bars and drinking saloons	10.00 to	30.00
Candy Manufactories	8.00 to	30.00
Cigar Manufactories, five hands under		5.00
Cigar Manufactories, every hand over five		1.50
Dray, team and street railroad horses, including washing of drays, wagons and cars, each horse,		1.50
Dyeing and scouring, including laundries	$15.00 to	40.00
Eating saloons	10.00 to	30.00
Fountains flowing not exceeding six hours per day during the season ⅛ inch orifice		5.00
During the season, 3-16 inch orifice		12.00
During the season ¼ inch orifice		25.00
During the season 5-16 inch orifice		45.00
Filling private cisterns, furnishing water only each time		1.00
Hotels and boarding houses, per room, wash basin same as private houses		1.00
Street sprinkling by hose, including washing and sprinkling sidewalks 50 feet front or less		5.00
Each additional foot		.10
Sprinkling lawns, per 1000 square feet, no charge less than $5.00		1.00
Livery and other public stables, including washing carriages, each horse		2.50
Offices and sleeping rooms, including wash basins,	$3.00 to	10.00
Printing offices, according to the number of presses and persons, not including steam engines	$6.00 to	40.00

Private stables, including washing carriages one horse.	3.00
Same, two horses,	5.00
Each additional horse	1.00
Public halls,	$5.00 to 20.00
Photograph gallery	$10.00 to 20.00
Steam Engines to be assessed as per nominal horse power of ten hours run,	2.50
Street sprinkling with wagon, each team employed per day,	.50
Stores,	$5.00 to 15.00
Steam boilers, for house warming etc., each square foot of surface, no charge less than $5.00	.30
Tobacco Manufactory, per hand, no charge less than $5.00	1.00
Urinals, with constant flow	10.00
Urinals, private	3.50
Wash basin, stationery, first basin in dwelling free; all others each	1.00
Water closets, in public houses, per bowl	5.00
Water closets, in private houses, per bowl	2.50
Each additional, per bowl	1.50
Work shops, ten persons or under	5.00
Each additional person	.25

Rents for all purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and water company, not exceeding meter rates.

202

Gals. per day.	Rate per 1,000 gals.
100 to 500	35c
500 to 1,000	30c
1000 to 2,000	25c
2000 to 4,000	20c
Over 4,000	15c

Sec. 11: In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works [works] under this Ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance, (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited and the said City of Omaha shall thereby be and become vested with the ownership, possession, control, and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation

therefor, to be ascertained as provided in section 14 of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation.

Sec. 12. Within ten days after the passage of this ordinance the City Clerk of the City of Omaha shall advertise for sealed proposals to be received thirty days after the first insertion of such advertisements for furnishing the city of Omaha with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works as fixed by the terms of this ordinance, through two hundred and fifty fire hydrants of the character and of the locations mentioned in this ordinance. The said
203 advertisement by said City Clerk shall be inserted for thirty consecutive days in each of the daily newspapers published in this City, and shall also be published in such other papers as the City Council may by resolution require. Such proposals or bids shall be accompanied by a bond with at least three resident sureties in the sum of Twenty-five thousand ($25,000) Dollars, conditioned, in the event of the acceptance of the bid and awarding of the contract for such public supply and fire protection to such bidder or bidders, for the faithful performance of the terms and conditions of this ordinance, and that the water to be furnished through said hydrants, shall at all times when required during said term (a reasonable time being allowed for repairs in case of unavoidable accidents) perform the tests mentioned in this ordinance, and give the fire protection herein mentioned; said bids shall specify the price per hydrant per year for the said two hundred and fifty hydrants during said term; also the price per hydrant per year for intermediate hydrants placed upon the mains specified in said report of J. D. Cook in excess of two hundred and fifty; and also the price per hydrant per year in case the city at any time during said term elects to have more hydrants upon new mains, such last mentioned additional hydrants when distributed along new mains, to be substantially at the same relative distance as those provided for in the report of J. D. Cook. Said bids shall also be accompanied by a conditional acceptance of this ordinance in the event the contract for the public supply and fire protection shall be awarded. The contract for such public supply and fire protection shall be awarded to the lowest responsible bidder, and the City Clerk in such advertisement insert the clause that the City council reserve the right to reject any and all bids. (Amended ordinance 430.)

Sec. 13: The said water works shall be constructed and completed within one year from and after the date of the

award of the contract for public supply and fire protection, unless the City Council shall by ordinance extend said time. (Amended ordinance 469.)

204 Sec. 14: The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the water works company, and these two to select the third; provided, that nothing shall be paid for the unexpired franchise of said company.

Sec. 15: This ordinance shall take effect and be in force from and after its passage. (Passed June 11, 1880.)

Attest:

J. F. McCARTNEY, City Clerk.

(Signed) JAMES E. BOYD,
Pres't City Council.

Approved June 11, 1880.

(Signed) CHAMPION S. CHASE, Mayor.

Defendants next offer in evidence a copy of Ordinance No. 430: Which is marked [Dedft's] Exhibit "4".

Objected to by Mr. Hall as incompetent, [irrelevent] and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the objection that it is a copy is hereby waived.

The following is a copy of Ordinance No. 430.

DEFENDANT'S EXHIBIT "4".

(Ordinance No. 430)

An Ordinance to amend sections three (3), Six (6) and twelve (12) of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska.

Be it Ordained by the City Council of the City of Omaha:

Section 1. That section three (3) of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of waterworks in the City of
205 Omaha, state of Nebraska," passed June 11, A. D. 1880, be, and the said section is hereby, amended so as to read as follows:

"Sec. 3. The pumping machinery of any such water works shall have an easy and aggregate capacity to pump at least

five million (5,000,000) gallons of water each and every twenty-four hours, and shall be increased as the growth of the city and its needs require, and shall have power sufficient to throw at any one time (but not at the same time that the machinery is pumping at the rate of five million (5,000,000) gallons per day into the reservoir) at the elevation of Fourteenth and Farnam streets, in said city, through one-inch nozzles, eight streams of water, each stream to the height of one hundred and ten feet, and also at any one time, but at a different time from the test aforesaid, at the elevation of the base of the High School Building in said City, through one-inch nozzles, four streams of water, each stream to the height of one hundred feet; and also at any one time, but at a different time from each of the tests aforesaid, two streams of water at the elevation of Eleventh and Pierce streets, two streams of water at the elevation of Fourteenth and Farnam streets and two streams of water at the elevation of Sixteenth and Grace Streets, each stream to the height of one hundred feet. The reservoir shall have a capacity of at least nine million (9,000,000) gallons of water."

Sec. 2. That section six (6) of said ordinance No. 423 be amended, and said section is hereby amended. So as to read as follows: "Sec. 6. All such water works shall be so constructed, and the mains, pipes and other fixtures thereof so located, placed and laid as to allow of and render feasible the locating, placing, erecting and constructing [or] not less than two hundred and fifty fire hydrants protected against frost. Said hydrant shall be placed at the points upon the public streets of said city designated in the adopted report of J. D. Cook, heretofore referred to, subject to such change of location as the City Council of Omaha may at any time
206 designate; Provided, that such change shall not be beyond the distribution of the mains of said water works Company, and shall have the capacity and powers to afford ample protection to property against fire for a radius of one thousand feet from each and every one of said hydrants, without the aid of either steam or hand engines. If the locality of hydrants shall be ordered changed after they have been set under the direction of the City Council, said change of location shall be at the expense of the City.

Sec. 3. That section Twelve (12) of said Ordinance No. 423 be and the same is hereby amended so as to read as follows:

"Sec. 12. The City Clerk of the City of Omaha shall advertise for sealed proposals, to be received by him in his office in the City of Omaha, Nebraska, until 12 O'clock, noon, on the twentieth day of July, A. D. 1880, for furnishing the City of

Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works as fixed by the terms of this ordinance, through two hundred and fifty fire hydrants of the character and of the locations mentioned in this ordinance. Said advertisement shall be inserted in each of the daily newspapers published in the City of Omaha, for each day that such newspaper may be issued during the term commencing July 16, A. D. 1880, and ending July 20, 1880, inclusive. Said proposals, or bids shall be accompanied by a bond with at least three sureties in the sum of twenty-five thousand ($25,000) dollars, conditioned, in the event of the acceptance of the bids, and awarding of the contract for such public supply and fire protections to such bidder or bidders, for the faithful completion of said water works in accordance with the terms and requirements of this ordinance and ordinance No. 423, and for such compliance for the further term of one year after the completion of said water works, and that the water to be furnished through said hydrants shall, at all times when required
207 during said term (a reasonable time being allowed for repairs in cases of unavoidable accidents), perform the tests mentioned in this ordinance, and give the fire protection herein mentioned. Said bids shall specify the price per hydrant per year for the said two hundred and fifty hydrants during said term. Also the price per hydrant per year for intermediate hydrants placed upon the mains specified in said report of J. D. Cook, in excess of said two hundred and fifty, and also the price per hydrant per year in case the City, at any time during said term, elects to have more hydrants upon new mains, such last mentioned additional hydrants, when distributed along new mains, to be substantially at the same relative distance as those provided for in the report of J. D. Cook. Said bids shall also be accompanied by a conditional acceptance of this ordinance, in the event the contract for the public supply and fire protection shall be awarded. The contract for such public supply and fire protection shall be awarded to the lowest responsible bidder, and the City clerk shall, in such advertisement, insert the clause that the City council reserves the right to reject any and all bids."

Sec. 4. This ordinance shall take effect and be in force from and after its passage.

Passed July 14, 1880.

Attest:

F. J. McCARTNEY, City Clerk.

(Signed) JAMES E. BOYD, Pres't City Council.

Approved July 15, 1880.

(Signed) CHAMPION S. CHASE, Mayor.

The defendant next offers in evidence a copy of the contract between the City of Omaha and Sidney E. Locke, for the construction of a water plant in the City of Omaha, and which contract was approved by the City Council July 20, 1880. Which is marked Deft's Exhibit "5."

208 Objected to by Mr. Hall as incompetent, irrelevant and immaterial, but there is no objection made to this offer because the contract offered is a copy of the original; the objection that [—] is a copy is hereby waived.

The following is a copy of Water Works Contract.

DEFENDANTS' EXHIBIT "5."

Water Works Contract.

This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th day of July, A. D. 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, Witnesseth:

Whereas, The City of Omaha, did on the 11th day of June A. D. 1880, pass its certain ordinance, No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska," and did, on the 14th day of July, A. D. 1880, pass its certain ordinance No. 430, entitled "An ordinance to amend sections three (3), six (6) and twelve (12)," of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska," and

Whereas, the City Council of said City of Omaha did receive from J. D. Cook, engineer, on the 25th day of May, A. D. 1880, the report, and on the 31st day of May, A. D. 1880, the appendix to said report referred to in section one (1), of said ordinance No. 423, and did, on the 8th day of June, A. D. 1880, adopt and approve said report and appendix; and

Whereas, The said city of Omaha, did in compliance with the provisions of said ordinance, advertise from the 16th day of July, A. D. 1880, to the 20th day of July, A. D. 1880 for sealed proposals for furnishing the city of Omaha, Nebraska,
209 with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works, through two hundred and fifty hydrants, of the character and of the locations mentioned in said ordinances Nos. 423, and 430, and said report of J. D. Cook engineer, as approved; and

Whereas, on said 20th day of July, A. D. 1880, at 12 o'clock noon, there were received and opened at the office of the City

Clerk of said City of Omaha certain bids and proposals and among them the proposal and bid of said Sidney E. Locke, party of the second part, which said proposal and bid of said Sidney E. Locke, was the lowest and best bid received for such furnishing of said City for water for fire protection and public use; and

Whereas, the said City council of the City of Omaha, did, on said 20th day of July, A. D. 1880, accept said proposal of said Sidney E. Locke, did award said contract to him, and did order that the said contract should be formally made by the mayor of said City of Omaha, acting in its behalf.

Therefore, It is hereby contracted and agreed by and between said parties, as follows:

In compliance with said ordinances Nos. 423 and 430 the said report of J. D. Cook, engineer, and the appendix thereto as approved by the said city Council, said advertisement, proposal and accepting thereof and awarding of said contract (all of which are herein recited as being understood to the parts of this contract) the said Sidney E. Locke, party of the second part, contracts and agrees with said party of the first part to erect, construct and maintain said water works in the City of Omaha, and to furnish the City of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works, as fixed by said ordinances Nos. 423 and 430, and by said report of said J. D. Cook as approved by said City Council. Said party of the second part further agrees to furnish said water through not less than two hundred and fifty
210 hydrants, of the character and as located and placed in said ordinances and approved report, at the rate of Eighty-four ($84) dollars per year per hydrant, and to furnish said water through such intermediate hydrants, in addition to the number first given, as may by the provisions of said ordinances and in accordance with said approved report be further called for or required, at the rate of ten ($10.00) dollars per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified, shall, during the said term, of twenty-five years, be required on new mains, to erect, construct and maintain said new mains and furnish said water through said additional hydrants at the rate of sixty ($60.) Dollars per year per hydrant.

And in consideration of the said agreements of the said Sidney E. Locke, the said party of the first part, agrees to pay for said hydrant water supply at the rates per hydrant per year above specified. The said payment to be made by warrants upon the 1st day of July and the 1st day of January of each

and every year of said term upon the treasury of said City; the payment for the water from each hydrant to commence when it is actually ready for use, and the City Clerk notified thereof, and the pay therefor shall cease during any time that said hydrant shall be out of repair or unfit for use.

This contract shall take force and effect only upon its approval by the City Council of the City of Omaha.

In testimony whereof we have hereunto set our hands at Omaha, Nebraska, the date first above written.

(Signed) THE CITY OF OMAHA,
By C. S. CHASE, Mayor.
SIDNEY E. LOCKE.

Signed in presence of

CHAS. F. MANDERSON.
C. J. WESTERDAHL.

Approved by the City Council July 20, 1880.

211 (Signed) JAMES E. BOYD,
Pres't City Council.

Attest:

J. F. McCARTNEY, City Clerk.

(Seal City of Omaha)

The defendant next offers in evidence a copy of Ordinance No. 445. Which is marked Deft's Exhibit "6."

Objected to by Mr. Hall as incompetent, [irrevelant] and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the objection that it is a copy is hereby waived.

The following is a copy of Ordinance No. 445:

DEFENDANT'S EXHIBIT "6"

(Ordinance No. 445)

WATER WORKS.*

An Ordinance permitting S. E. Locke, or his assigns, contractors with the city of Omaha, for the erection and maintenance of water works and supplying said city with water for public use, to locate the reservoirs of said water works upon

* Note.—See report of J. D. Cook, consulting engineer, filed in Clerk's office Oct. 8, 1880; Report of Henry Rohwer, City Engineer, filed Oct. 8, 1880.

Reservoir addition to the city of Omaha instead of near Hanscom Park.

Be it Ordained by the City Council of the City of Omaha:

Section 1. That whereas, under the terms and conditions of ordinance No. 423, passed June 11, 1880, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska," and of ordinance 430, passed July 15, 1880, amendatory thereof, S. E. Locke, being the lowest and best bidder, was awarded the contract for furnishing the city of Omaha with water
212 for fire protection and public use, and did, upon the 20th day of July, 1880, enter into contract with said city of Omaha to furnish it with such water supply, and did accept the terms and conditions of said ordinances Nos. 423 and 430, and did enter into bonds with said city for the faithful performance of said contract; and whereas, it was provided by the report of J. D. Cook, engineer, filed May 25, 1880, and the appendix thereto filed May 31, 1880, which were duly made a part of ordinances and were accepted as the plan of said water works by said S. E. Locke, that the site of the reservoir should be near "Hanscom park:" and whereas, on the 6th day of October, A. D. 1880 the said S. E. Lock, or his assigns, filed with the city clerk of the city of Omaha the report of J. D. Cook, consulting engineer, dated September 20, 1880, recommending that the site of such reservoirs be changed from Hanscom park to a tract of land adjoining the western limits of the city of Omaha, bounded on the north and south by Hamilton and Cuming streets, and the west by the county road near the north and south center line of section 17, township 15, range 13 east of the 6 principal merid-an, which said tract of land has since been platted by its proprietors, Samuel R. Johnson and Nathan Shelton, as an addition to the city of Omaha, and is now a part of said city known as Reservoir addition to the city of Omaha; and, whereas, the said S. E. Locke, or his assigns, have made petition and request to the city council of the city of Omaha to change the location of said reservoirs from said Hanscom Park to said last described lands; and, whereas, the recommendation of said J. D. Cook, consulting engineer, is concurred in by Henry Rohwer, city engineer of Omaha; therefore the said S. E. Locke, or his assigns, is hereby authorized and permitted to locate said reservoirs of the said water works upon said tract of land now a part of the city of Omaha, known as the Reservoir addition to the city of Omaha, as surveyed, platted, approved by the mayor and the city council and of record in the
213 office of the county clerk of Douglas county, Nebraska; Provided, However, and this change of said reservoir is permitted to be made upon the following conditions, viz:

there shall be no change of hydrants, and the location thereof, as provided in said ordinances Nos. 423 and 430, and the accompanying plans, unless such change shall be made by the city council as provided for in said ordinances; there shall be no extension of the time provided in section 13 [or] ordinance 423, from such change of site of reservoirs; and said water works shall be constructed and completed within one year of the 20th day of July, A. D. 1880; there shall be no lessening of the sizes of the mains and pipes from the sizes fixed in said reports of J. D. Cook, engineer filed May 25, 1880, and May 31, 1880; and any new locations or change in the mains and pipes necessitated by the change of the site of the reservoir shall be subject to the inspection, approval and allowance of the city council of Omaha.

Sec. 2. The change of site of said reservoirs of said water works contemplated by the first section of this ordinance shall not be authorized or permitted until they shall be filed in the office of the city clerk of the city of Omaha the written acceptance and consent to this ordinance of said S. E. Locke and his assigns, and also the written consent to this ordinance and the contemplated change of location reservoirs of all the sureties upon the bond of said S. E. Locke, filed July 20, 1880, and the agreement of said sureties with the city of Omaha, that nothing herein contained shall be considered as releasing the said sureties from their obligation upon said bond.

Sec. 3. This ordinance shall take effect and be in force from and after its passage. (Passed November 9, A. D. 1880.)

Attest:

J. F. McCARTNER, City Clerk.

(Signed) JAMES E. BOYD,
Pres't City Council.

Approved November 11, A. D. 1880.

(Signed) CHAMPION S. CHASE, Mayor.

214 Defendant next offers in evidence a copy of Ordinance No. 469. Which is [markec] Deft's Exhibit "7"

Objected to by Mr. Hall as incompetent, irrelevant and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the objection that it is a copy is hereby waived.

The following is a copy of Ordinance No. 469.

DEFENDANT'S EXHIBIT "7"

(Ordinance No. 469.)

An Ordinance to amend section 13 of ordinance 423, entitled "An ordinance to authorize and procure the construction and

maintenance of water works in the city of Omaha, state of Nebraska."

Be [ir] Ordained by the City Council of the City of Omaha:

Section 1. That section 13 [od] ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska," passed June 11, 1880, be and the said section is hereby amended so as to read as follows:

"Sec. 13. The said water works shall be constructed and completed within one year and four months from and after the date of the award of the contract for public supply and fire protection unless the city council shall, by ordinance, extend said time."

Sec. 2. This ordinance shall take effect from and after its passage. (Passed July 19, 1881.)

Attest:

J. J. L. C. JEWETT, City Clerk.

THOMAS A. DAILEY, Pres't City Council.

Approved July 26, 1881.

JAMES E. BOYD, Mayor.

Defendant next offers in evidence copy of Ordinance No. 618. Which is marked Deft's Exhibit "8"

Objected to by Mr. Hall as incompetent, irrelevant and immaterial, but there is no objection made to this offer because the ordinance offered is a copy of the original; the ob-
215 jection that it is a copy is hereby waived.

The following is a copy of Ordinance No. 618;

DEFENDANT'S EXHIBIT "8"

Ordinance No. 618.)

An ordinance accepting the water works built for the city of Omaha by the City Water Works company of Omaha, under ordinances 423, 430, 445 and 469, and the contract entered into in accordance therewith, and approved by the city council July 20th, 1880, be and the same are hereby accepted by the mayor and the city council as a full and complete compliance with said contract and ordinances by said water works company, and that the time of completion of said water works as mentioned, stated and designated in said ordinances and contract be and the same is hereby extended to, and shall be construed to refer to and mean, the date of approval of this ordinance by the mayor of said city.

Sec. 2. This ordinance shall take effect and be in force [—] and after its passage and approval.

W. I. BAKER, Pres't City Council.

Attest:

J. J. L. C. JEWETT, City Clerk.

Approved September 4, 1893.

C. S. CHASE, Mayor.

New York City, July 28, 1894.
10 o'clock A. M.

Pursuant to agreement of parties, the following testimony was taken at the above time and place, in the office of Turner, McClure & Rolston, before E. S. Dundy, Jr., Master & Examiner in Chancery, the Complainant, The Farmers' Loan & Trust Company, being represented by its Solicitors, Mr. Turner, Mr. Geller and Mr. Hall, and the defendants, The American Water Works Company of Illinois and The American Water Works Company of New Jersey, by their Solicitor, Mr. John L. Webster.

216 William B. Cardoza, a witness produced on behalf of the complainant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Geller.

Q. Mr. Cardoza, please give your name, age, place of residence and occupation?

A. William B. Cardoza, 28 years old; trustee bond clerk of Farmers Loan & Trust Company, New York.

Q. How long have you been in the employ of the Company?

A. About 13 years.

Q. Do you now have anything to do with the delivery of bonds secured by mortgages made to the Farmers Loan & Trust Company?

A. Yes, sir.

Q. What duties do you perform in that connection?

A. I take the bonds out of the vault and bring them upstairs and make the delivery if Mr. Searles has not already made it, and make the entry in the book and watch the bonds while they are counted and delivered.

Q. Who is Mr. Searles?

A. Our Vice-President.

Q. Have you charge of the book containing the entries and deliveries of the bonds?

A. Yes, sir.

Q. Will you produce the mortgage dated the first day of July, 1887, made by the American Water Works Company, Corporation organized under the laws of the State of Illinois, to the Farmers Loan & Trust Company, and recorded in Book

67 of Mortgages on page 598 in the office of the county clerk of the County of Douglas and State of Nebraska, on the 18th day of July, 1884?

A. Yes, sir.

The Mortgage being produced, it is agreed by Counsel that the original need not be annexed to this deposition, but it shall be produced at the trial of the cause.

217 Said Mortgage, marked Complainant's Exhibit 1, together with the acknowledgment of certificates of record, is offered in evidence by the Complainant.

The defendants object to the introduction of this document, Complainant's Exhibit 1, in evidence, as incompetent.

Q. Will you produce the supplemental mortgage made by the American Water Works Company, a corporation organized under the laws of the State of Illinois to the Farmers Loan & Trust Company, dated the 16th day of January, 1889, and recorded in the office of the Register of Deeds of Douglas County, in the State of Nebraska, in Book 115 of Mortgages, page 75, on the 27th day of March, 1889?

A. Yes, sir; here it is.

The Supplemental Mortgage, together with the certificates of acknowledgment and record, and all the papers fastened together with the tape, are offered in evidence by the complainant, marked, for identification, Complainant's Exhibit "2."

The defendants object to the introduction of this document in that it does not appear that the original mortgage or the supplemental mortgage are properly executed; 2, The defendant Company was not clothed with authority, neither did it give authority to its officers to make and execute any such mortgages as these exhibits purport to be.

Q. Mr. Cardoza, you have testified that you have under your charge the book containing the records of deliveries of bonds that have been secured by the Farmers Loan & Trust Company as Trustee under mortgages made to it, do you produce that book now?

A. Yes, sir.

Q. Is there a record in that book of the deliveries of the bonds certified by the Farmers Loan & Trust Company under the mortgages which have been offered in evidence?

218 A. Yes, and I produce a copy.

By Mr. Geller: The pages of the book produced containing the records in question are offered in evidence, being pages 130, 131, 34 and 35, Receipt Book for New Bonds, No. 5.

The witness produces a copy of the pages referred to which is by consent of Counsel thereto annexed, and is as follows:

					$5000	order of	
1887							
July	18	Rec'd	Receipts	No. 1/50	50	Pt. & Sec't	No charge
	19	"	"	51/240	190	B/D	
	"	"	"	241/320	80		C. H. Venner & Co.

					$1000	Exchg. for Interim					
1887											
Aug.	31	Rec's	Bonds	No. 1/400	400	144/223	Express value $50000.				C. H. Venner & Co. Boston, Mass.
"	"	"	"	401/450	50	61/70	W. T. Hatch & Sons by C. Armstrong.				
Sept.	1	"	"	451/500	50	51/60	Adams Exp.	val.	$1000.		Wilson Colston & Co., Bal., Md.
"	"	"	"	501/630	130	34, 39, 41, 49, 50, 33, 101/120	"	"	"	$100000.	W. & P. Smith, Phila., Pa.
"	2	"	"	631/680	50	16/25	"	"	"	$2000.	" "
"	"	"	"	681/720	40	76/80, 125, 133/4	"	"	"	$5000.	Woodbury & Moulton, Portland, Me.
"	"	"	"	721/815	95	1/15, 29, 30, 32, 48	"	"	"	$40000.	W. & P. Smith, Phila., Pa.
"	"	"	"	816/825	10	31,37,	"	"	"	$5000.	" "
"	"	"	"	826/850	25	121/2, 124/6	"	"	"	$5000.	Woodbury & Moulton, Portland, Me.
"	20	"	"	851/1500	650	81/100, 127/30, 135/43, 224/320	"	"	"	$50000.	C. H. Venner & Co., Boston, Mass.
Dec	"	"	"	1501/1600	100	26/8, 35/6, 38, 40, 42/7, 71/5, 131/2	"	"	"	$25000.	C. H. Venner & Co., Boston, Mass.
1888											
Mch	15	"	"	2001/2200	200	4/7/88, Aff't of Pt. & Treas. &	"	"	"	$25000.	C. H. Venner & Co., " "
July	1	"	"	2201/2500	300	order of the Co. for 500 Bonds.	"	"	"	$100000.	C. H. Venner & Co., " "
Sept	10	"	"	2501/2700	200	8/23/88, [Aff'f] of Pt. Sec. & Tres					
1889						& order of Co. for 200 Bonds.	"	"	"	$100000.	C. H. Venner & Co., " "
Jan.	3	as	Dec.	" 31/88	2701/2800	100	12/26/89, Aff't of Pres & Sec'y				
"	"	"	"	"	2801/2900	100	& order of Co. for 300 Bonds.	"	"	"	$50000. C. H. Venner & Co., Boston, Mass.
Feb.	1	"	"	"	2901/3000	100		"	"	"	$25000. C. H. Venner & Co., Boston, Mass.
Aug.	13	"	"	"	3001/3100	100	Aff't of Pt. & Sec'y & order	C. H. Venner & Co.			
Sept	5	"	"	"	3101/3200	100	for 600 Bonds.	C. H. Venner & Co.			
Oct.	28	"	"	"	3201/3300	100		C. H. Venner & Co.			
Nov.	7	"	"	"	3301/3400	100		C. H. Venner & Co.			
Dec.	13	"	"	"	3401/3500	100		C. H. Venner & Co.			
1890											
Jan	30	"	"	"	3501/3600	100	12/289, Aff't of Pt. & Sec. &	C. H. Venner & Co.			
Feb.	13	"	"	"	3601/3700	100	order for $200,000.	C. H. Venner & Co.			
Mch.	20	"	"	"	3701/3800	100	1/15/90, Aff't of Pt. Sec. & Tr.	C. H. Venner & Co.			
May	2	"	"	"	3801/4000	200	order for $200,000.	C. H. Venner & Co.			

220 Q. This book [the] the book of the original entries, is it?

A. Yes, sir.

Q. And those entries are made in the usual course of business?

A. Yes, sir.

Q. At the times the bonds are delivered?

A. Yes, sir; at the time of the delivery.

Q. And are just and true?

A. Yes, sir.

Q. Are any of the bonds secured by these mortgages now in possession of the Farmers Loan & Trust Company?

A. Yes, sir.

Q. What are the numbers?

A. Nos. 1601 to 2,000.

Q. Does the record you produce show which of these bonds bear five per cent interest and are payable in gold?

A. Only from the memorandum written in the book here by Mr. Searles, "No. 2001 to 3000, stamped Gold."

Q. He is the same gentleman you spoke of as the Vice-President?

A. Yes, sir.

Q. What has he generally to do with the delivery of the bonds?

A. Yes, sir.

Q. What has he generally to do with the delivery of the bonds?

A. He signs the trustee certificate on the face of the bond, or back of the bonds, whichever it may be, examines the mortgage and attends to all the deliveries, as to the papers, the orders, etc.

Witness excused.

The further taking of testimony is adjo-rned until 10 o'clock. Monday morning July 30, 1894.

221 New York City, Monday, July 30, 1894.
10 o'clock A. M.

Pursuant to adjournment, the further taking of testimony is resumed before E. S. Dundy, Jr., Master and Examiner in Chancery, as follows:

Present, representing Complainant, Mr. Geller.

Present, representing Defendants American Water Works Company of New Jersey and American Water Works Company of Illinois, Mr. John L. Webster.

Albert L. Bannister, a witness produced in behalf of the Complainant, being duly sworn, testifies as follows.

Direct Examination.

By Mr. Geller.

Q. Please give your name, age, place of residence and occupation?

A. Albert L. Bannister; age 29; residence Newark, N. J.

Q. What is your occupation?

A. Clerk with the Farmers Loan & Trust Company.

Q. How long have you been connected with the Company?

A. Four years and about a half.

Q. What are your duties?

A. Bookkeeper.

Q. Have you charge of the ledger containing the entries of the bonds of the American Water Works Company secured by the mortgages which are being foreclosed in this suit?

A. I have for the payment of coupons on the bonds.

Q. Have you that book with you?

A. I have.

Q. Will you kindly open it to the record?

A. Yes, sir.

Q. Looking at the record, will you please state when and how much money was received by the Farmers Loan & Trust Company for the payment of January, 1892 coupons on these bonds?

222 A. We received on March 31, 1892, by order of H. C. Caldwell, United States Circuit Judge, from the Receivers, $4,090.00 with which to pay certain January, 1892 and February 1892, coupons not already provided for, and on April the First of the same year we received from C. H. Venner, Vice-President, $279.57 balance.

Q. How many coupons were paid for the money so received?

A. We paid 35 coupons at $30 and 128 at $25, with interest on them.

Q. What was the amount of the interest paid on the defaulted coupons?

A. Ninety cents interest on the $30 coupons and 37 1/2 cents on the $25. coupons.

Q. How much balance of that money is there now in your hands?

A. $30.83.

Q. What moneys did the Farmers Loan & Trust Company receive to pay the July 1892 coupons?

A. $50,000.

Q. At what time?

A. July 1, 1892.

Q. How many coupons did you pay with that money?

A. 885 at $30, 938 at $25.

Q. And what money have you received to pay January, 1893, coupons?

A. $75,500.

Q. When was that received?

A. $37,500 was received January 3, 1893; January 14, $38,000.

Q. How many of your January, 1893 coupons did you pay with that money?

A. 1234 at $30; 1536 at $25.

223 Q. How much money, if any, remitted to pay the July, 1892, coupons, have, you, any?

A. No.

Q. How much money to pay the January, 1893, coupons have you on hand?

A. We have'nt any.

Q. On certain of the January 1893, coupons you paid interest, did you?

A. Yes; on certain ones.

Q. Which ones are those?

A. We paid January 14, 343 at $30, 792 at $25, on which we paid 13 days interest at 6 per cent.

Q. To whom was that money paid?

A. To C. H. Venner Co.

Q. Has the Farmers Loan & Trust Company received any other money to pay either the July, 1892 or January, 1893 coupons except that which you have testified to?

A. No sir, not that I know of.

Q. In each case you were also paid from the money that was remitted to you a certain amount for your commissions for disbursing it?

A. Yes, sir.

Q. How much did that amount to?

A. One quarter of one per cent.

Q. What was the amount in January, 1892 coupons?

A. January 1892 we did'nt get any money.

Q. July, 1892 coupons?

A. $125.

Q. January, 1893?

A. $188.71.

224 Cross Examination:

By Mr. Webster.

Q. You know nothing of the payment of coupons except such payments as went through your office and was entered by you on that book, do you?

A. No sir.

Q. So far, then, as coupons may have been paid by order of the court and where the coupons were presented to the Clerk of the court and filed, or otherwise, you have no knowledge of such transaction?

A. No sir.

Q. And you do not know anything about the extent of them?

A. No sir.

Witness excused.

Robert E. Boyd, a witness produced in behalf of Complainant, being duly sworn, testifies as follows:

Direct Examination

By Mr. Geller.

Q. Please state your name, age, place of residence and occupation?

A. Robert E. Boyd, age 33 years; residence, Hotel Endicott, New York City, occupation, clerk for Farmers Loan & Trust Co.

Q. What are your duties as clerk?

A. Among other things to receive bonds for deposit under plans for reorganization.

Q. Have you received the bonds deposited with the Farmers Loan & Trust Company secured by the mortgages which are sued upon by the Farmers Loan & Trust Company in this suit?

A. I have.

Q. Have you charge of the record of the receipts of those bonds?

A. I have.

Q. Have you that record with you?

225 A. Yes, sir.

Q. Will you look at the record of the receipts?

A. Yes, sir.

Q. Does that record show in detail the numbers of bonds deposited by various persons?

A. It does.

Q. And the names of those persons or their addresses, the coupons attached to the bonds deposited and the coupons detached from the bonds and deposited separately?

A. It does.

Q. Look at your record, Mr. Boyd and see how many of the five per cent bonds have been deposited with you?

A. $1,784,000 in amount.

Q. And how many of the six per cent bonds?

A. $1,725,000 in amount.

Q. Mr. Boyd, will you prepare a list showing the number and amount of January 1, 1892, July 1, 1892 coupons, and January 1893 coupons which have been deposited with the Farmers Loan & Trust Company and forward the same to the examiner to be attached to your deposition, whether these coupons are attached to the bonds or detached from the bonds?

A. Yes, sir. Said list is as follows:

Coupons due { Jan. 1, 1892 / July 1, " / Jan. 1, 1893 } from Five Per Cent Bonds Deposited in F. L. & T. Co., July 30, 1894.

Depositor.	No 9 Jan. 1892	No. 10 July, 1892.	No. 11 Jan. 1893	
Abegg & Rush	2018 2026			
	2041/9 2051/7			
	2061/70 2106/11			
	2133/5 2151/9			
	2161 2175/84			
94 Grand St City	2195/2200 2205			
"	2211/20 2226/35			
"	2247/59 2261			
	2278/90 2297/306			
	2317/22 2358/82			
	2388/9 2398/2403			
"	2405 2421/3			
	2439/40 2463/5			
	2477/85 2488/90			
	2492/4 2498/500			
	2503/25 2529/33			
	2536/44 2558/70			
	2573/7 2583			
	2588 2590/1			
	2593/5 2600/15			
	2627/30 2669/78			
	2695/706 2709/22			
	2734 2776/9			
	2781/6 2797/9			
	2809/10 2819/30			
	2835/49 2852			
	2961/5 2994			

	3000	3075/82					
	3093/4	3110/18					
	3120/4	3151/5					
	3361/4	3371/80					
	3384/6	3389/90					
	3609/13	3801/48					
"	3871/4	3876/8					
	3890	2470/4					$12,000
	3879/88						
John B. Morris Saugatuck, Ct	.....	.....	2351/5	2475/6	.....		172
John Ellis 328 S. 15th St. Philadelphia, Pa	.....	.....	.....	.....	3301		55
Chas. Norris C/o The Land Title & Trust Co. Philadelphia, Pa	.....	.....	.....	.....	3288/90	3346/60	
					3531/2	.....	500
							$12,700

SUMMARY.

No. 9 Jan. 1892	$12,000
No. 10 July 1892	175
No. 11 Jan. 1893	525
	$12,700

[227] AMERICAN WATER WORKS COMPANY

Coupons due { Jan. 1, 1892 / July 1, " / Jan. 1, 1893 } from Six Per Cent Bonds Deposited in F. L. & T. Co. July 30, 1894.

Depositor.	No. 9 Jan. 1, 1892	No. 10 July 1, 1892.	No. 11 Jany 1, 1893.	
Woodbury & Moulton, Portland, Me	3,12/15 18/35			
	41/64 67/69			$3,000
"	131/43			150
	71/87 80/6 110/22			
Coddington Svgs. Bnk. Newport, R. I.	160/4			
Woodbury & Moulton		978/9 996/1000		
"		1053/7 1063/4		
"		1096/7 1233/42		
"		1249/50 1252/78		
"		1291/1300 1306/17		
"		1329/30 1362		
"		1370/1 1571/6		
"		1579/80 1586/95		3,000
Mount Hermon Boy's School, Mount Hermon, Mass		121/129		210
Coddington Svgs. Bank		160/4		150
Woodbury & Moulton			704	30
Mt. Hermon Boys School			123/9	210
Maitland, Phelps & Co. City			1440/9	300
Coddington Svgs. Bank			160/4	150
				$7,200

SUMMARY.

No. 9 Jan. 1892	$3,150
" 10 July, 1892	3,360
" 11 Jan, 1893	690
	$7,200

228 Q. Mr. Boyd, these bonds and coupons that are deposited with you are deposited under a plan of agreement with the Bondholder's committee, are they?

A. Yes, sir.

Q. Have you a copy of that agreement?

A. I have.

Q. Is it printed?

A. It is.

Q. And each person depositing bonds and coupons or either have signed this agreement, have they?

A. Yes sir.

Q. Will you also furnish the Examiner to be attached to your deposition a printed copy of this plan and agreement under which the bonds and coupons have been deposited with you?

A. I will.

The following is a copy of the plan and agreement;

COMPLAINANT'S EXHIBIT "6".

New York, August 16, 1893.

To the Holders of Bonds of the American Water Works Company of Illinois, secured by mortgage on the Omaha Water Works:

For the purpose of protecting their respective interests, the owners and representatives of a large amount of the outstanding bonds of the American Water Works Company of Illinois, secured by its mortgage of July 1, 1887, to the Farmers' Loan & Trust Company on the Water Works at Omaha, Nebraska, have agreed to the following plan, and have irrevocably appointed the undersigned and their successors a Committee for carrying out such plan, which the undersigned have undertaken to do. The essential provisions of the plan are as follows:

1. The Committee is to consist of Messrs. Ernst Thalmann, Chairman (of Ladenburg, Thalmann & Co.), New York; Rosewell G. Rolston) President of the Farmers' Loan & Trust Company, New York; Gerald L. Hoyt (of Maitland, Phelps
229 & Co.), New York; Frederick Strauss (representing J. W. Seligman & Co.), New York; Winthrop Smith (of Winthrop & Percy Smith), Philadelphia, and Theodore C. Woodbury (of Woodbury & Moulton), Portland, Maine, with power to add members.

Any vacancy in the Committee, by death or accepted resignation of a member, may be filled by a majority of the remaining members.

The Committee as at any time constructed shall have all the powers and rights of the Committee as now formed.

Meetings of the Committee, to be held in the city of New York, may be [cammed] by the chairman or by any two members of the committee, on reasonable notice to all members.

Action of the committee at any time can only be taken by a majority of the Committee as then constructed.

No member of the Committee shall be personally responsible for the acts of other member-, nor personally answerable except for his own wilful misconduct.

2. Holders of bonds and coupons secured by the mortgage aforesaid, including matured and unpaid coupons, are to transfer the same to the Committee in trust for the purpose of carrying out the plan, and deposit them with the Farmers' Loan & Trust Company, at No. 22 William street, New York, which will issue therefor, subject to the terms and conditions thereof, its negotiable certificates, which may be registered, representing the interests of the depositors by reason of the deposit. Holders of unpaid coupons matured prior to January 1, 1894, will, upon deposit thereof, receive separate certificates, and special provision will be made for such coupons so as to preserve their status.

Such bonds and coupons shall thereafter be held by the Trust Company in trust [fot] the Committee for the purposes of the plan.

230 3. The Committee, as holder of the deposited bonds and coupons, may take any action under said mortgage which the depositors could have taken, and shall cause the mortgage to be foreclosed as soon as possible.

4. In case a majority of the bonds secured by said mortgage shall be deposited hereunder, the Committee may, in its discretion, purchase at foreclosure sale the property covered by the mortgage, for any price not exceeding the principal and interest then accrued and unpaid on all the bonds secured by the mortgage and any cash payments required to be made, if the property be sold subject to the underlying mortgage of the City Water Works Company of Omaha, dated August 2, 1880, and may apply towards payment for the property the bonds and coupons deposited hereunder.

5. The Committee may [acquire] for the benefit ratably of the holders of all the outstanding certificates issued for bonds and matured and unpaid coupons deposited hereunder, all or any of the bonds, to the amount of four hundred thousand

dollars, secured by said underlying mortgage, with any unpaid coupons thereof, and may purchase its mortgage property on any foreclosure of said underlying mortgage. In case of the purchase of said underlying bonds and coupons, the Committee may transfer the same to the new company hereinafter provided for, or may otherwise dispose of the same for not less than the price paid therefor.

6. In case the committee shall purchase the mortgaged property, it may convey the same to a new company, incorporated under the laws of such state as the committee may determine; or may otherwise dispose of said property, for not less than the amount of the principal and accrued interest of all of the bonds secured by said mortgage of July 1, 1887, and said cash payment and the expenses and charges of the trustee of the mortgage and of the Committee, if the foreclosure
231 sale shall have been made subject to said underlying mortgage, or for not less than said principal, interest cash payment, expenses and charges, and the additional cost and expenses, if the property shall have been purchased on the foreclosure of said underlying mortgage.

7. The Committee may, in its discretion, sell all the bonds and coupons deposited hereunder, for not less than the principal and interest then accrued thereon and all expenses and charges of the trustee of the mortgage and of the committee.

8. The committee may, for the purpose of making the cash payment required on any foreclosure sale, or for the purpose of making any acquisition of underlying bonds, assess the certificate holders ratably and have a lien upon the interests represented by the certificates for any unpaid assessment, or may borrow money for any such purpose or for the purpose of otherwise carrying out the provisions of the plan, and may pledge, for repayment of any moneys so borrowed, any of the bonds and coupons deposited hereunder, or any other assets in the hands of the committee.

9. The Committee shall be entitled to a proper compensation for its services, to be determined, in case of question, by the presidents of two New York trust companies, to be named by the Committee.

10. Each bondholder shall, upon depositing his bonds hereunder, pay to the Trust Company, subject to the order of the Committee, ten dollars per bond, on account of the legal and other expenses of carrying out the plan, for which ex-

penses the Committee may make such further assessment on the certificate holders as may be necessary.

The audit and approval of the accounts of the Committee for all such expenses, by an auditor appointed by the presidents of the said two trust companies, shall be a release and discharge of the Committee with respect thereto.

232 11. The Committee shall, after payment of the expenses of foreclosure and all expenses incurred by the Committee and its compensation, allot to the certificate holders their proportionate interests in the new company or their proportionate share in the proceeds of any sale by the Committee.

12. The Committee shall, prior to the conveyance of any purchased property to a new company, submit to the Certificate holders a detailed plan of reorganization, which shall be binding upon all said holders, unless the holders of a majority in interest of the outstanding certificates shall, within thirty days, file with the Trust Company their written dissent from said plan.

13. Any notice from the Committee to a certificate holder may be given by mailing the same, with postage prepaid, to the address of the certificate holder as registered by such holder with the Trust Company, or in care of the Trust Company if no address be so registered.

14. The Committee may supply any defects or omissions in this plan which it shall deem necessary to be supplied to enable the Committee to carry out the general purposes of the plan; and, with the consent of the holders of a majority in interest of the outstanding certificates, may take any action other than is provided for in this plan which the Committee shall unanimously determine to be for the benefit ratably of all the certificate holders.

15. The Committee may determine the time within which bonds and coupons may be deposited hereunder, and may grant extensions of such time, with or without conditions.

16. In case a majority of the bonds secured by said mortgage of the American Water Works Company of Illinois shall not have been deposited hereunder by November 1, 1893, the Committee may return all deposited bonds and coupons upon surrender of the certificates issued therefor, and cease from its undertaking.

The privilege of depositing their bonds and coupons
233 hereunder, on or before November 1, 1893, is now offered to the holders of all the outstanding bonds and matured and unpaid coupons secured by said mortgage.

ERNEST THALMAN, Chairman,
No. 44 Wall Street, New York.
R. G. ROLSTON.
GERALD L. HOYT.
FREDERICK STRAUSS, Secretary.
No. 15 Broad Street, New York.
WINTHROP SMITH.
THEODORE C. WOODBURY.
Committee.

To Messrs. Ernst Thalman, Rosewell G. Rolston, Gerald L. Hoyt, Frederick Strauss, Winthrop Smith and Theodore C. Woodbury, Committee:

The undersigned, in consideration of your undertaking as a Committee to carry out the plan set forth in your foregoing Circular of August 16, 1893, hereby transfer in trust to you and your successors as such Committee, and deposit with the Farmer's Loan and Trust Company of New York, the following securities:

Six per cent. bonds of the American Water Works Company of Illinois, numbered

with all matured coupons.

Matured and unpaid coupons of six per cent. bonds of said company, amounting to $————.

Five per cent. bonds of said Company, numbered

with all unmatured coupons.

Matured and unpaid coupons of five per cent. bonds of said Company, amounting to $

——and agreed to all the terms and conditions of said circular, and irrevocably appoint you and your successors, attorneys for the undersigned, with full power to execute such instruments and do such things as may be necessary or desirable in the judgment of the Committee to carry out said plan.

234 Dated ————————————, 1893.

(Endorsed on back as follows)

Omaha Water Works. Plan and Agreement with Bondholder's Committee.

Q. Referring to your record, which of the bonds bear interest at the rate of six per cent?

A. Bonds Nos. 1 to 2,000 and bonds Nos. 3,001 to 4,000, unless it should be decided to reduce interest on bonds 3,001 to 4,000.

Q. Do you know whether the interest was reduced on 3,001 to 4,000?

A. It was reduced.

Q. I show you bond No. 3,501, being a bond between the numbers stated, and ask you whether that is like all the bonds that have been deposited with you between this number 3,001 and 4,000?

A. That is like the other bonds.

Q. What rate of interest did the bonds between 2,001 and 3,000 bear?

A. Five per cent.

Q. I show you Bond 2,028 being one of the bonds between those numbers, and ask you whether that is like all the other bonds that have been deposited between those numbers?

A. Yes sir.

Q. The bonds between No. 1 and No. 2,000 bear interest at six per cent?

A. Yes sir.

Q. I show you bond No. 946, and ask you whether that bond is like all the other bonds between those numbers that have been deposited with you?

A. It is.

The bonds above referred to are marked respectively Complainant's exhibits 3, 4, and 5.

The Copy of plan and agreement of the bondholder's committee is marked Complainant's Exhibit 6.

235 The signatures of the witnesses to the depositions herein are waived by agreement of the parties.

It is stipulated that if in view of any evidence introduced by the defendants in this action it shall seem important to the Complainant to show who are the persons who deposited the bonds with the Farmer's Loan & Trust Company by the witness Boyd, that the said Boyd may send to the Examiner a transcript of the record which he produced, showing the names etc., of the parties depositing the bonds with him.

Witness excused.

Adjourned until Tuesday, July 31, 1894, 10 o'clock A. M. at Boston, Mass.

Boston, Tuesday July 31, 1894. 10 o'clock A. M.

Pursuant to adjournment the further taking of testimony was resumed before E. S. Dundy, Jr., Master and Examiner in

Chancery, the complainant being represented by Mr. Geller, and the defendants, The American Water Works Company of Illinois, and the American Water Works Company of New Jersey by Mr. Webster.

TESTIMONY FOR DEFENDANTS.

The defendants The American Water Works Company of Illinois, and The American Water Works Company of New Jersey, offer in evidence three papers, marked respectively defendants exhibits number 9, 10 and 11, the same being circulars issued in behalf of the Bondholder's Committee, Supplemental to the Plan of Reorganization offered in evidence by the Complainant.

Objected to by Mr. Geller as irrelevant.

Following are copies of 9, 10 and 11.

DEFENDANT'S EXHIBIT "9".

Bondholder's Committee.

Omaha Water-Works.

236 Ernest Thalman, Chairman, 44 Wall St. N. Y.

R. G. Rolston,

Gerald L. Hoyt,

Frederick Strauss, Sec'y Mills Building, N. Y.

Winthrop Smith,

Theodore C. Woodbury.

New York, August 30th, 1893.

Dear Sir: The Bondholders' Committee begs to urge you to deposit without delay, with the Farmer's Loan & Trust Company, No. 22 William Street, New York, under the plan and agreement of August 16th, all your bonds and coupons of the American Water Works Company, so that a majority of the bonds may be obtained as soon as possible and the [situateion] controlled.

Quick, concentrated action of the bondholders will greatly aid the Committee in bringing about a speedy foreclosure or settlement. The Committee has already been addressed by the Chairman of the Committee appointed by the City Council of Omaha to ascertain upon what terms the City can purchase the Water Works.

Any assessment which the Committee may make for legal and other expenses on holders of certificates issued for de-

posited bonds, in addition to the payment at the time of deposit, will not exceed ten dollars per bond.

Yours truly,

ERNEST THALMAN,
Chairman.

DEFT'S EX. "10"

Omaha Water Works.

C. H. V. & Co.,
N. Y.
Oct. 16, Rec'd.
Ans'd.....

237 To the Holders of American Water Works Company (Omaha) Five Per cent and Six Per Cent Bonds:

The undersigned Committee begs to announce that foreclosure proceedings have now been begun and will be pressed with all possible speed, and advises all Bondholders that have not already deposited their bonds with the Farmer's Loan and Trust Company, No. 22 William Street to do so at once, in their own interest, at the same time assuring them that the Committee will exert every effort on their behalf, at least possible expense.

Bondholders are again cautioned against their coupons, or giving any powers of attorney, or being influenced by misleading statements made in circulars freely issued by parties antagonistic to their interests as bondholders.

Attention is called to the fact that the time for the deposit of bonds expires on November 1st, after which date bonds will only be received by the Committee on terms to be announced hereafter.

New York, October 10, 1893.

ERNST THALMAN, Chairman,
Of Ladenburg, Thalman, & Co., 46 Wall Street, New Y.
ROSEWELL G. ROLSTON, President
Of Farmer's Loan & Trust Co., 22 William Street, New Y.
GERALD L. HOYT,
Of Maitland, Phelps & Co., 24 Exchange Place, New York.
FREDERICK STRAUSS, Secretary,
Representing J & W Seligman & Co., 15 Broad Street, New York.
WINTHROP SMITH,
Of W. & P. Smith, 439 Chestnut Street, Philadelphia, Pa.
THEODORE C. WOODBURY,
Of Woodbury & Moulton, Portland, Me.
WM. R. NICHOLSON, President
Of Land Title & Trust Co., 608 Chestnut Street, Philadelphia, Pa.

238 DEFTS. EX. "11."

Omaha Water Works.

To the Holders of the American Water Works Company (Omaha) 5 per cent and 6 per cents Bonds.

The undersigned Committee begs to announce that it has on deposi- a majority of the above named bonds.

Desiring as far as pos-ible, the Co-operation of all Bondholders the Committee hereby extends the time allowed for such deposit with The Farmer's Loan and Trust Company, No. 22 William Street, New York City, under this plan to November 28th, 1893, after which date bonds will be received on payment of a penalty of $10 per bond, in addition to the regular assessment of $10 per bond until December 20th, 1893.

The Committee is advised by Counsel that powers of attorney given with coupons sold do not preclude Bondholders that may have sold their coupons from joining the foreclosure proceedings.

Two receivers in the interest of Bondholders have been appointed by the Court in the foreclosure proceedings.

New York, November 1st, 1893.

ERNST THALMAN, Chairman,
Of Ladenburg, Thalman & Co., 46 Wall Street, New York.

ROSEWELL G. ROLSTON, President
Of Farmer's Loan & Trust Co., 22 William Street, New York.

GERALD L. HOYT,
Of Maitland, Phelps & Co., 24 Exchange Place, New York.

FREDERICK STRAUSS, Secretary,
Representing J. & W. Seligman & Co., 15 Broad Street, New York.

WINTHROP SMITH,
Of W. & P. Smith, 439 Chestnut Street, Philadelphia, Pa.

239 THEODORE C. WOODBURY,
Of Woodbury & Moulton, Portland, Me.

W. R. NICHOLSON, President
Of Land Title and Trust Co., 608 Chestnut Street, Philadelphia, Pa.

Clarence H. Venner, a witness produced in behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination.

By Mr. Webster.

Q. You may state your name, age, residence and occupation?

A. Clarence H. Venner; age, thirty-eight; at present residing at Boston.

Q. What relation did you sustain to the American Water Works of Illinois at the time of the issue of the First consolidated mortgage offered in evidence in this cause by the Complainant?

A. I was the holder of a very considerable amount of the Company's stock, but not an officer of the company at that time.

Q. As such holder of stock, did you have anything to do or say with reference to the management of the affairs of that Company?

A. I was one of the promoters of the Company, and as such promoter, furnished the money to buy the stock of the City Water Works Company of Omaha.

Q. Did you afterwards become an officer of the American Water Works Company of Illinois, and if so, what office did you hold in that Company?

A. I was elected a director in the Illinois Company, sometime, I think, in the year 1888.

Q. Did you have any connection with the American Water Works Company of New Jersey, and if so, what?

A. I was largely concerned in this organization and furnished the money for the first and only cash subscription to its stock, and was director and vice president from the date of its organization and am so still.

240 Q. Who composed the firm of C. H. Venner & Company?

A. At [wazt] time?

Q. At the time the bonds referred to in the bill of Complaint in this case were delivered by the Farmers Loan & Trust Company, to C. H. Venner & Company as set down in the exhibit offered by the complainant, a copy of which I show you?

A. During the period from August 31, 1887, to December 6, 1887, when the ($1,600,000.00) Sixteen Hundred Thousand Dollars of six per cent bonds, Nos. 1 to 1600 inclusive were delivered by the Farmers Loan & Trust Company, and during the period from March 16, 1888, to September 16, 1888, when the $700,000.00 five per cent bonds, Nos. 2,001 to 2700 inclusive were delivered by the Farmer's Loan & Trust Company, I was the sole and only member of the firm of C. H. Venner & Company.

Q. From the date last named by you, in your previous answer up to and including May 12, 1890, what other persons besides yourself composed the firm of C. H. Venner & Company?

A. From September, 10, 1888, to January 1, 1889, I had no partner, but after January 1, 1889, down to May 12, 1890, a person by the name of W. A. Underwood, was a member of my firm, though having no financial interest therein.

Q. What official relation did W. A. Underwood during that period of time sustain to the American Water Works Company?

A. Mr. Underwood, was the President of that Company during most of the period mentioned by you, having been elected shortly after the time when the bonds were issued.

Q. Do you know the firm of W. & P. Smith of Philadelphia, Penn.?

A. I do.

Q. What relation did that firm or either member thereof sustain to the American Water Works Company of Illinois?

A. Mr. Winthrop Smith, the senior member of that firm, was elected a director of the American Water Works Company of Illinois, I think in the year 1888, at the same time that
241 the Board was increased from three to seven when I was elected.

Q. State whether or not Mr. Smith became an officer of the American Water Works Company of New Jersey?

A. He was elected a director of the Company of New Jersey, at a time shortly after the date of the organization of that Company.

Q. State, if you know what portion, if any, of these bonds referred to, were used in purchasing or paying for stock of the City Water Works Company of Omaha?

A. The first $1200,000.00 of six per cent bonds numbered from 1 to 1200 inclusive.

Q. Do you know who are the owners and holders of the outstanding coupons maturing January 1, 1892?

A. I do.

Q. Please state?

A. Of the $98,000.00 which matured that date, $56,725.00 were paid either by the Company at maturity or by the Receivers since then, and $38,275. are now outstanding, having been purchased by the persons and in the amounts as follows: Omaha National Bank $8,000.00; United Water Works Company, Limited, $15,275.00; A. Rubel, $12,000.00 Woodbury & Moulton, $30,000.00.

Q. You may state whether or not, if you know, the Omaha National bank and the United Water Works Company who owned the coupons as stated by you respectively purchased the same for the purpose of having a foreclosure, or whether or no, they desire a foreclosure of the mortgage?

By Mr. Geller: I object to that question and move to strike out the preceding one on the ground that it is calling for hearsay evidence, and that as to the preceding [ques-] question, the coupons be produced by the persons to show that they own them.

A. They purchased the coupons for the purpose of avoiding a foreclosure, and are not in favor of such foreclosure.

242 Q. At whose instance did the Omaha National Bank and the United Water Works Company, purchase the coupons referred to in your last answer?

Objected to by Mr. Geller as hearsay.

A. By my direct request and solicitation.

Q. Are you an officer of the United Water Works Company?

A. I am at present.

Q. What office do you hold in that company?

A. President.

Q. What do you know about the coupons held by Mr. A. Rubel, as to whether or no Mr. Rubel desires a foreclosure on account of these coupons, or otherwise?

Objected to by Mr. Geller as hearsay.

A. The coupons held by Mr. Rubel, were purchased by him through me, for the purpose of avoiding a default, and foreclosure proceedings, Mr. Rubel being a stockholder in the American Water Works Company.

The Complainant moves to strike out the last part of that answer "that he is a stockholder, on the ground that that is secondary evidence.

Q. State, whether or no, you have personal knowledge of the fact that Mr. Rubel is a stockholder in the Company?

A. I have, for he purchased his stock through me.

Q. Is the United Water Works Company also a stockholder in the American Water Works Company?

A. It is a stockholder of the American Water Works Company of Illinois.

Q. Can you state the amount of stock held by the United Water Works Company?

A. It holds $185,000.00 of the preferred stock and $500,000.00 of the Common stock of the Illinois company.

All the testimony as to the stock held in the corporation is taken under the objection of secondary evidence.

243 Q. You may state what you know of the coupons maturing, July 1st, 1892?

A. Of the $98,000.00 which matures that date, $50,000.00 were paid by the Receivers.

By Mr. Geller: That is plainly hearsay evidence.

A. (Continued) And $47,500.00 were purchased by me as Agent for the following parties; American Exchange

National Bank, New York, $25,000.00; National Bank of Redemption, Boston, $9,990.00; John T. Christie, $7,500.00; Woodbury & Moulton, $3,000.00; The United Water Works Company Limited $2,010.00; leaving $500.00 of the installment due that date unpurchased.

The Complainant moves to strike out that part of the answer, which says that the Receivers paid $50,000.00 of those coupons, as hearsay.

Q. By your answer to the effect that $50,000.00 of these coupons were paid by the Receivers, you may state whether you mean they were paid by the Receivers and the coupons taken up by the Receivers, or whether or no the money was transmitted by the receivers to the Farmers Loan & Trust Company, for the purpose of paying these $50,000.00 bonds?

A. The funds for the payment of $50,000.00 of coupons due July 1st, 1892, were remitted by the Receivers to the Farmers Loan & Trust Company, of which fact I was informed by the Farmers Loan & Trust Company, and by the Receivers, and furthermore, I personally collected some coupons out of that fund.

Q. As to other coupons aside from the $50,000.00 so paid and held by the persons named in your answer, and in the amounts respectively as in your answer stated, aggregating $47,500.00, state whether or no, said coupons were held by these persons respectively, for the purpose of avoiding a foreclosure, or whether or not they desired a foreclosure of the mortgage, state what you know upon that subject?

244 Objected to by Mr. Geller, and calling for hearsay evidence, the parties can testify themselves as to what they desire.

A. The persons who bought those coupons, did so at my request, and for the purpose of preventing a default which might result in foreclosure.

Q. What do you know of the coupons maturing January 1, 1893?

A. Of the $98,000.00 maturing that date, $75,500.00, were paid by the Farmers Loan & Trust Company from funds remitted by one E. Hyde Rust, who was then acting as Receiver of the property at Omaha, and $21,290.00 were purchased by the United Water Works Company Limited and the C. H. Venner & Company, and are now held by those parties; $1210.00, the balance remaining have not been presented for purchase or payment so far as I am informed.

The Complainant moves to strike out that part of the Answer which states that $75,500.00 of those coupons have been paid

by the Farmers Loan & Trust Company from funds remitted by E. Hyde Rust as hearsay evidence.

Q. You may state what is your means of knowledge upon which you base the statement that $75,000.00, of these coupons were provided for by moneys transmitted by E. Hyde Rust to the Farmer's Loan & Trust Company?

A. I was informed by E. Hyde Rust, Receiver, that he had remitted that amount of money to the Farmers Loan & Trust Company; I was informed by the Farmers Loan & Trust Company, that they had received that amount, and I personally collected at the office of said Trust Company from the funds so remitted something more than $30,000.00 of the coupons due that date which I have purchased under an arrangement with the Receiver.

The Complainant moves to strike out all the part of the answer stating the information derived from Mr. Rust and then from the Trust Company as hearsay.

245 Q. You may state what you know as to whether the persons holding the remainder of the coupons maturing January 1st, 1893, held the same for the purpose of avoiding a foreclosure?

Complainant objects as calling for hearsay evidence.

A. They do.

Q. State what you know of the coupons maturing July 1st. 1893?

A. Of the $98,000.00 maturing that date, $31,415.00 were purchased by me as Trustee from a large number of the Bondholders who signed instruments waiving all defaults, and there are $66,585.00 un-purchased coupons of that date.

The Complainant moves to strike out the portion of answer which states that they were purchased by the witness as Trustee of Bondholders who had signed instruments waiving defaults, on the ground that the instruments themselves are the best evidence.

Q. Do you know what demand, if any, has ever been made by the Farmers Loan & Trust Company upon the American Water Works Company of Illinois, the mortgagor company for the payment of any of these matured coupons?

Objected to by Complainant on the ground that it is immaterial and on the further ground that it is calling for hearsay evidence.

A. I never heard of such demand being made.

Q. Have you been, during all this period of time, an officer of the Illinois Company?

A. I have been an officer of that Company since early in the year 1893.

Q. Has your relationship to that Company during this period of time, been such that if a demand had been made upon that Company by the Farmers Loan & Trust Company for the payment of these coupons that you would have known about that?

Objected to by Complainant as calling for a conclusion of the witness.

246 A. I certainly would; My relation with the different officers of the Company being such as to put me in possession of information as to such demand if one had ever been made.

The Defendant's counsel here gives notice that he will use upon the hearing of this case as evidence, so much of the reports of the Receivers, Ellis L. Bierbower and A. B. Hunt in the suit of the Denver City Water Works Company et al, vs. The American Water Works Company, et al., and of the reports of A. B. Hunt as temporary Receiver in the same action; said suit being pending in the Circuit Court of the United States for the District of Nebraska, as show the transmission of money by said Receivers respectively to the Farmers Loan & Trust Company and as may have been used by said Receivers respectively for the payment of coupons.

Q. Do you know, Mr. Venner, or have you the means of stating about the amount of money now on hands in the possession of the Omaha Water Plant?

Objected to by Complainant as hearsay.

A. I was informed by Mr. Bierbower, one of the Receivers at Omaha, during the latter part of April last, that the Receivers had on hand about $75,000.00 cash, and from my knowledge of the operation of that property I am bound to believe that the Receivers at this time have a very much larger sum than $75,000.00 on hands.

Defendant's counsel here gives notice that on the hearing he will use as evidence in this case so much of the reports of the Receivers, Ellis L. Bierbower and A. B. Hunt, in the suit of the Farmers Loan & Trust Company vs The
247 American Water Works Company, et al., being the present suit of foreclosure, as will indicate the amount of money now on hands in the possession of the Receivers.

Objected to by Complainant as irrelevant and immaterial.

Defendant's Counsel also gives notice that upon the hearing he will refer to and use as evidence the bill in the suit of the Denver City Water Works Company, et al., vs. The American Water Works Company, et al, and the answer of the American Water Works Company in said suit, and also the decree in said action, appointing Receivers of the Omaha Water Plant.

Complainant objects to the bill and the Answer of the Water Works Company or Water Works Companies in that suit, on the ground that it is incompetent and irrelevant; the Farmers Loan & Trust Company is not a party to the suit.

Q. Mr. Venner, how closely and intimately connected had you been with the management of the Omaha Water Plant prior to the appointment of the Receivers in the suit of the Denver City Company vs. The American Water Works [Works] Company, just above referred to?

A. I was at that time the Vice President of the New Jersey Company, Chairman of its Finance Committee, and a member of the Executive Committee of three having full charge of the Omaha Water plant.

Q. Have you from that time up until the filing of the
248 bill in the present case by the Farmers Loan & Trust Company been familiar with the financial status of the Omaha Water plant?

A. I have.

Q. You may now state, Mr. Venner, whether or no that water plant, in your opinion was at all times, or would at all times been financially able to take care of its coupons as they matured had it not been for the appointment of the Receiver above mentioned?

Complainant objects as immaterial and calling for conclusion.

A. Entirely so.

Q. What do you mean by the answer entirely so?

A. Entirely able to take care of the coupons upon its bonds as the same matured if the corporation could have handled and managed the property itself through its own officers.

Q. Mr. Venner, I desire to call your attention to a suit brought in the Court of Chancery, in the State of New Jersey, for the appointment of a Receiver of the American Water Works Company of New Jersey, said suit being the one referred to in the bill of Complaint filed by the Farmers Loan & Trust Company in the present action, and ask you to state whether you know who were the attorneys or solicitors for the complainants in that action?

A. The bill was signed "Lindley M. Garrison, Solicitor of Complainants, and David McClure and Herbert B. Turner of Counsel."

Q. You may state who David McClure and Herbert B. Turner are?

A. They are members of the firm of Turner, McClure & Rolston, Lawyers, of the City of New York.

Q. What relation did they sustain to the Farmer's Loan & Trust Company?

A. They are the attorneys for the Farmer's Loan & Trust Company.

Q. Is that the same firm of attorneys in the City of New York who filed the bill of Complaint in the present case to foreclose this mortgage?

249 A. It is.

"It is an admitted fact that a suit was brought in the Superior Court of the State of New York, in which the American Water Works -ompany, a corporation organized under the laws of the State of New Jersey, against Clarence H. Venner, George P. Toby, and Frederick Mills, co-partners under the name of C. H. Venner & Co., Defendants, and which bill was signed by Turner, McClure & Rolston, as attorneys for Plaintiff, and which bill was verified on the 28th day of September, 1891, by Dennis Sullivan, Vice President of the American Water Works Company, and the eleventh paragraph of said bill of complaint reads as follows:

"That the plaintiff is a solvent corporation and possessed of more than sufficient assets to pay all its outstanding obligations, and that the defendants at the meeting of the Board of Directors of the plaintiff held on the 23rd day of September, 1891, and hereinbefore referred to, made statements as to their inability to make payments under the said agreement, Exhibit "B," which led plaintiff to conclude that the defendants are insolvent."

The fact shown is objected to by complainant on the ground that it is irrelevant, and immaterial, and on the further ground that the Farmers Loan & Trust Company is not a party to the action.

Q. Mr. Venner, did you make a request to the Farmers Loan & Trust Company, or to its solicitors, Turner, McClure & Rolston to be furnished with the names of the persons, if any, pretending to be holders of bonds under the mortgage now sought to be foreclosed who requested or made any demand upon the Farmers Loan and Trust Company to declare a forfeiture of the mortgage or to file a bill of foreclosure, and if so, did you receive a response to that communication?

Complainant objects to the question so far as it calls in the contents of the [of the] written instrument, on the
250 ground that the instrument should be produced and also on the ground that it is immaterial.

A. Yes sir; I wrote to President Rolston on November 1, 1893, and received an answer thereto, dated November 2, 1893.

Defendants offer in evidence a letter from C. H. Venner to the President of the Farmers Loan & Trust Company on the date of November 1, 1893, a copy of which is hereto attached as Deft's. Exhibit "12," and also produce the original letter signed by Turner, McClure & Rolston in reply thereto, and ask that a copy thereof, be attached to this deposition as Defts' Exhibit "13."

Complainant objects to the two letters Exhibits "12" and "13" on the ground that they are immaterial.

(Following are copies of Defts' Exhibits "12" and "13".)

DEFT'S EX. "12."

New York, November 1, 1893.

R. G. Rolston, Esq., President.

Farmers' Loan & Trust Company,

No. 22 Williams St., N. Y. City.

Dear Sir: Your company is the Trustee under the mortgage of The American Water Works Company dated July 1, 1887. I am the owner of a large amount of the bonds secured by that mortgage and as Trustee for others, am the holder of a large amount of past due coupons from said bonds, which have been purchased for the purpose of protecting the property and preventing a foreclosure. I am informed that your Company recently filed in the United States Circuit Court, District of Nebraska, a bill for the foreclosure of said mortgage, and
251 that Ellis L. Bierbower and Alonzo B. Hunt, were appointed Receivers in said suit.

I call your attention to the enclosed advertisement which has for some time past, appeared in the public press of New York, Boston, Baltimore and Philadelphia, and in certain foreign cities. This advertisement is signed by Messrs. Ernest Thalman, Roswell G. Rolston, President of the Farmers' Loan & Trust Company, 22 Williams Street, New York, G. L. Hoyt, Frederick Strauss, Winthrop Smith, Theodore C. Woodbury and Wm. R. Nicholson. It requests the holders of the above mentioned bonds to deposit them with your Company to protect their interests, and cautions bondholders against selling

their coupons, or giving any Powers of Attorneys of being influenced by misleading statements made in circulars freely issued by parties antagonistic to the bondholders' interests.

In addition to my interest in these securities as above stated, I beg further to advise you that I am the Vice President of the American Water Works Company (of New Jersey) one of the defendants in the suit above mentioned.

I beg you to inform me at once the names of the parties who requested you to institute proceedings to foreclose the mortgage above mentioned, and the date of such request, and also how many bonds of said issue, if any, have been deposited with, and now held by you for the purposes stated under your scheme for the foreclosure of said mortgage.

Please state what amount of the deposited bonds have the July 1st, 1893, coupons attached.

Yours truly,

C. H. VENNER.

DEFT'S EX. "13."

Law Offices of Turner, McClure & Rolston,
The Farmers' Loan & Trust Co., Building,
22 Williams Street, New York.

252 November 2, 1893.

C. H. Venner,
33 Wall Street,

Dear Sir: The Farmers' Loan and Trust Company is in receipt of your letter of the 1st inst., and has referred the same to us.

Taking all the circumstances into consideration, including the Testimony that you have given respecting your property in other proceedings, we do [do] not see any right on your part to demand from the Trust Company an answer to the questions contained in your letter.

Very Truly Yours,

TURNER, McCLURE & ROLSTON.

Cross Examination.

By Mr. Geller.

Q. How many bonds secured by the mortgage offered in evidence do you state are outstanding?

A. Of the bonds purporting to be secured by the mortgage set up in this action there are $3,600,000 outstanding and $400,-

000 in the hands of the Farmers Loan & Trust Company held for the purpose of retiring a like amount of the bonds of the City Water Works Co. of Omaha.

Q. $2,000,000 of these outstanding bonds at 5 per cent and $1,600,000 at 6 per cent, is that right?

A. Yes, sir.

By Mr. Geller: Counsel for Complainant asks the following questions on cross-examination without waiving the objections made to the questions on the direct examination.

Q. If I understood your testimony correctly you stated that $38,275 of the coupons due January 1, 1892, are outstanding and unpaid?

253 A. They are outstanding in the hands of the purchasers who have not presented them for payment and are still withholding them.

Complainant moves to strike out the part of the answer following the words "outstanding unpaid" on the ground that it is not responsive and on the further ground that it is hearsay.

Q. I also understood you to say that $47,500 of the coupons due July 1, 1892 secured by the mortgages foreclosed are outstanding and unpaid?

A. They are outstanding in the hands of the parties who furnished the money through me to buy the coupons from the original bondholders.

Complainant objects to all that part of the answer following the words "outstanding," on the ground that it is not responsive, and moves to strike it out.

Q. Besides the $38,275 coupons of January 1, 1892, of which you have spoken, there are also outstanding as I understand you, $725 of coupons of that date unpaid?

A. I do not so understand it; on the contrary, I understand that the full amount of coupons other than the amounts stated by me to have been purchased have been paid, at least, sufficient funds were remitted to the Farmer's Loan & Trust Company for that purpose.

Complainant moves that that part of the answer stating that sufficient funds were remitted to the trust Company to pay the remaining coupons be stricken out on the ground that it is not responsive and that it is hearsay.

Q. Of the Coupons due July 1, 1892, I understood you to say that there are also $500 of those coupons besides those that you stated were purchased which are outstanding and unpaid?

254 A. My information is that $500 of the coupons due that date have not been presented for payment or purchase.

Complainant objects to the whole of the answer on the ground that it is not responsive and moves to strike it out.

Q. Are $500 of the coupons due July 1, 1892, in addition to the $47,500 which you have stated were purchased, still outstanding and unpaid, are they, or are they not, I want an answer yes or no.

A. I believe the $500 are outstanding and unpaid.

Q. Of the coupons due January 1, 1893, I understood you to state that $21,290 had been purchased by certain parties and that besides that $1210 of coupons due on that date are outstanding, is that correct?

A. That is my information.

Q. Of the coupons due July 1, 1893, $31,415 I understand you to say have been purchased by you for certain bondholders and are unpaid, and $66,585 being the balance of the coupons then due, are outstanding and unpaid, is that true?

A. My testimony on direct examination is not exactly as you have stated it. What I did say in substance was that $31,415 of the coupons due July 1, 1893, had been purchased by me as trustee from a large number of bondholders, and that there were $66,585 of coupons due that date which had not been purchased.

Q. These $66,585 coupons do you know whether they are or are not paid, answer yes or no?

A. As a matter of positive knowledge, I do not.

Q. Where is your permanent residence if Boston is your temporary residence?

A. I do not know that I have stated that Boston is my temporary residence.

255 Q. When you state that you are at present residing in Boston, do you mean to state that you are a temporary resident here or a permanent resident?

A. I should have stated that my present place of residence is at Swampscott, near the City of Boston.

Q. When did you cease to be a resident of New York City?

A. I do not know that I have any objection to telling it, but from my recollection of the issues in this case that is a question which is not involved.

Q. Suppose you do not pass upon the relevancy of the action, let your counsel object, if it is irrelevant.

By Mr. Webster: Unless there is some objection to it I would answer it.

A. I have not resided in the City of New York, since a year ago last June, that is to say: in the month of June, 1893 I went to Far Rockaway to spend the summer and have not since resided in New York except for a few days at a time.

Q. Have you an office in New York now?

A. I have not.

Q. Is not there an office on Wall Street somewhere, an office which bears your name?

A. It may be that the office which I formerly occupied has the name of C. H. Venner Co. on the door, I do not know whether it has been erased or not.

Q. Does the C. H. Venner Co. have an office in New York City now?

A. Not now.

Q. Was there any reason that induced you to change your residence?

A. There must have been, otherwise I would not have changed.

Q. Well, what was the reason Mr. Venner?

A. That is my private affair, and with all due deference to the counsel, I must insist upon keeping my private affairs to myself unless they are someway necessary or proper to this proceedings.

256 Q. When you stated that you furnished money to buy the stock of the City Water Works Company, what exactly did you mean by that, did you advance the money yourself, or that you secured it from others?

A. I mean exactly what my answer indicated—that I furnished the money to purchase the stock of the City Water Works Company of Oomaha.

Q. Was it your own money or some money that you had borrowed for that purpose?

A. O, it is possible that I borrowed money; most people in my line of business do borrow money at times.

Q. Did you get any return from the American Water Works Company for this money that you advanced to buy this City Water Works stock?

A. The American Water Works Co. of Illinois paid me in its bonds $1,200,000 for the shares of stock of the City Water Works Co. which I advanced to purchase.

Q. And those bonds that were so given to you were bonds numbered from 1 to 1200, inclusive?

A. Numbered from 1 to 1200.

Q. Is it not true Mr. Venner, that the United Water Works Co. which you state is the holder of certain coupons secured by this mortgage, requested the Farmers Loan & Trust Company to declare the principal of the mortgage due sometime in the year 1893?

A. I was not an officer of the United Water Works Co. at the time you mentioned.

Q. Don't you know that to be a fact, or do you not?

A. I presume the proceedings of the Company would show whether it is a fact or not.

Q. Where are those books of the Company?

A. In the possession of the Secretary of the Company.

Q. Don't you know as a matter of fact that such a request was made?

257 A. Well, if such a request was made the request itself would show.

Q. I am asking you whether you do not know it as a fact that the request was made?

A. The full litigation affecting the American Water Works Co. is so complicated that it is very necessary for me to refresh my memory of any occurrence by the production of papers or other data.

Q. Were or were you not Vice President of the United Water Works Co. in 1893?

A. I have already testified that I was not an officer of the United Water Works Co. at the time mentioned, ceasing to be an officer and director early in January, 1893.

Q. When did you become President, did you say?

A. I became President of the United Water Works Co. in January, 1894.

Q. Does the Omaha National Bank hold any of the bonds secured by this mortgage, to your knowledge?

A. Not that I know of.

Q. Does the United Water Works Co. hold any of the bonds?

A. It does.

Q. How many?

A. I think the amount is $10,000.

Q. Does this Mr. Rubel hold any bonds of the American Water Works Company?

A. I sold him a large amount, and I understand that he is the holder of a considerable amount.

Complainant moves to strike out the answer as hearsay.

Q. I asked you whether you knew he was a holder of bonds?

A. I have been informed by him that he was.

Complainant moves to strike out the answer as hearsay.

Q. Do you know whether he is a holder of bonds

258 to-day?

A. Well, I have not examined his safe to ascertain, but I can state nothing beyond my information and belief.

Q. I do not want that, I want to know whether you know he is the owner or holder of bonds or not?

A. From positive knowledge I can not state.

Q. Do you know whether Woodbury & Moulton are holders of bonds to-day?

A. I believe not.

Q. Do you know whether the American Exchange Bank of New York owns any bonds secured by this mortgage?

A. I believe not.

Q. The National Bank of Redemption, does that hold any bonds of this company?

A. I do not know positively.

Q. John T. Christie, does he hold any bonds?

A. Not that I know of.

Q. For whom did you act as trustee in purchasing the $31,415 of July, 1893, coupons?

A. Various people.

Q. Were they bondholders?

A. I think some were.

Q. To what extent were they bondholders to your knowledge?

A. Not a very large extent; they were mainly stockholders.

Q. Can you state the names of the persons for whom you acted?

A. I can, but I do not know that it would be proper in this inquiry for me to do so.

Q. Where are these coupons?

A. In my hands.

Q. In this office?

A. No sir.

Q. Where then?

A. In the vaults.

Q. In the City of Boston?

259 A. Yes sir.

Q. Under the laws of what State was the United Water Works Co. incorporated?

A. New York.

Q. Have you a copy of its certificate of incorporation?

A. No; I have not with me.

Q. For what purpose was it created, if you remember?

A. To do a general Water Works business, including the purchase and holding of securities issued by water works corporations.

Q. Where is its principal office?

A. Its [principle] office is here.

Q. In Boston?

A. Yes sir, that is its active office.

Q. Does it have an office in New York?

A. Yes sir.

Q. Where is that?

A. Well, I should say it had an office in New York up to the time that I closed my office there, but since then the Company has engaged no permanent headquarters in New York.

Q. Can you state positively and of your own knowledge whether or no the Omaha National Bank, Mr. Rubel, or Woodbury & Moulton have parted with the Coupons of January 1, 1892, or whether they still hold them?

A. So far as I know they are still the owners of them.

Q. Well, do you not know, or do you know that as a fact?

A. I have heard nothing to the contrary.

Q. What of the fact, do you know whether they own them or not, positively, do they, yes or no?

A. The Coupons mentioned have not been taken up by the Receivers so far as I am informed, and my latest information was to the effect that those parties still owned them.

260 Complainant objects and moves to strike out the answer as hearsay and not responsive.

Q. Won't you kindly tell me now of your own knowledge whether you know, I do not want your information, or what you believe, but what you know about it to day?

A. I can state nothing beyond my belief; they may have sold them since I last had any positive knowledge.

Q. And that is also true of the coupons held by purchase of the American Exchange National Bank, The National Bank of Redemption and John T. Christie?

A. It is not true as to John T. Christie.

Q. It is true as to the others. What do you know about John T. Christie?

A. I have been recently informed by Mr. Christie that he still held them and would not part with them except with my sanction.

Complainant moves to strike out the answer as not responsive and hearsay.

Q. I want to know what you know about it, whether Christie owns that $7500 of coupons today or whether he does not?

A. According to my best information and belief he does hold them.

Complainant moves to strike out the answer as not responsive and hearsay.

Q. I want your positive knowledge, do you know or do you not?

A. Well, I have not seen Mr. Christie to-day; he may have sold them since sunrise this morning.

Q. Do you know whether Woodbury & Moulton are holders of bonds to-day?

A. I believe not.

Q. Do you know whether the American Exchange Bank of New York owns any bonds secured by this mortgage?

A. I believe not.

Q. The National Bank of Redemption, does that hold any bonds of this company?

A. I do not know positively.

Q. John T. Christie, does he hold any bonds?

A. Not that I know of.

Q. For whom did you act as trustee in purchasing the $31,415 of July, 1893, coupons?

A. Various people.

Q. Were they bondholders?

A. I think some were.

Q. To what extent were they bondholders to your knowledge?

A. Not a very large extent; they were mainly stockholders.

Q. Can you state the names of the persons for whom you acted?

A. I can, but I do not know that it would be proper in this inquiry for me to do so.

Q. Where are these coupons?

A. In my hands.

Q. In this office?

A. No sir.

Q. Where then?

A. In the vaults.

Q. In the City of Boston?

259 A. Yes sir.

Q. Under the laws of what State was the United Water Works Co. incorporated?

A. New York.

Q. Have you a copy of its certificate of incorporation?

A. No; I have not with me.

Q. For what purpose was it created, if you remember?

A. To do a general Water Works business, including the purchase and holding of securities issued by water works corporations.

Q. Where is its principal office?

A. Its [principle] office is here.

Q. In Boston?

A. Yes sir, that is its active office.

Q. Does it have an office in New York?

A. Yes sir.

Q. Where is that?

A. Well, I should say it had an office in New York up to the time that I closed my office there, but since then the Company has engaged no permanent headquarters in New York.

Q. Can you state positively and of your own knowledge whether or no the Omaha National Bank, Mr. Rubel, or Woodbury & Moulton have parted with the Coupons of January 1, 1892, or whether they still hold them?

A. So far as I know they are still the owners of them.

Q. Well, do you not know, or do you know that as a fact?

A. I have heard nothing to the contrary.

Q. What of the fact, do you know whether they own them or not, positively, do they, yes or no?

A. The Coupons mentioned have not been taken up by the Receivers so far as I am informed, and my latest information was to the effect that those parties still owned them.

260 Complainant objects and moves to strike out the answer as hearsay and not responsive.

Q. Won't you kindly tell me now of your own knowledge whether you know, I do not want your information, or what you believe, but what you know about it to-day?

A. I can state nothing beyond my belief; they may have sold them since I last had any positive knowledge.

Q. And that is also true of the coupons held by purchase of the American Exchange National Bank, The National Bank of Redemption and John T. Christie?

A. It is not true as to John T. Christie.

Q. It is true as to the others. What do you know about John T. Christie?

A. I have been recently informed by Mr. Christie that he still held them and would not part with them except with my sanction.

Complainant moves to strike out the answer as not responsive and hearsay.

Q. I want to know what you know about it, whether Christie owns that $7500 of coupons to-day or whether he does not?

A. According to my best information and belief he does hold them.

Complainant moves to strike out the answer as not responsive and hearsay.

Q. I want your positive knowledge, do you know or do you not?

A. Well, I have not seen Mr. Christie to-day; he may have sold them since sunrise this morning.

Q. He may have sold them yesterday?

A. Or yesterday.

Q. So you don't know whether he holds them to-day?

A. I do not know whether he holds them at this present moment, but I believe he does; I have no reason to think otherwise.

Q. Who was Secretary of the United Water Works Company when you were Vice President?

A. J. W. Jackson.

261 Q. When did he cease to be Secretary?

A. I could not state from memory the time.

Q. Did you ever know a man of the name of W. H. N. Francis being Secretary?

A. Yes sir.

Q. When was he Secretary?

A. I do not remember how long he has been Secretary; I think he succeeded Mr. Jackson.

Q. Do you know whether he was Secretary in February, 1893?

A. I could not state positively without referring to the records of the Company.

Q. What is your best recollection on that subject?

A. My impression is that he was Secretary at that time.

Q. Do you remember the fact that on or about the 15th day of December, 1892, The Holly Manufacturing Co. recovered a judgment against you and certain persons for $14,894.87?

A. I decline to answer any questions relating to my private affairs involving matters not, pertinent to this inquiry until the Court in which this case is to be tried determines that matters not alluded to in the bill of complaint or the answer are relevant and material.

Q. Is it not a fact that upon a judgment recovered against you and other defendants for the amount stated, in an action brought in the Superior Court of the State of New York by the said Complainant, an execution was issued to the Sheriff of the County of New York, where you then resided, and was returned unsatisfied?

A. I decline to answer for the rea-on stated in the preceding answer.

Q. Were you a resident of the City of New York on January 20, 1893?

A. I decline to answer for the reasons stated above.

Q. Is it not a fact that subsequent to this issue and return of an execution as above stated on said judgment, an order was made for your examination at a proceeding sup-

262 plemental to said execution, and served upon you, and that you appeared in response to said order and submitted to on examination in said proceedings?

A. I most respectfully decline to answer for the reasons stated.

Q. Is it not a fact that in those proceedings a subpoena was served upon you requiring you to produce certain books, and that you failed to comply with said subpoena so served upon you?

A. I decline to answer for the same reasons.

Q. Is it not a fact that subsequent to your failure to produce the books of account of yourself and your firm as called for by said subpoena, proceedings were then taken in the said Superior Court for your punishment for contempt of Court in failing to comply with the terms of said subpoena?

A. I most respectfully decline to answer for the reasons above stated.

Q. Is it not a fact that an order was made in said proceedings declaring that you were in contempt of Court, and directing that you be committed by the Sheriff of the City and County of New York to the County jail of said County to be there retained in close custody until you produce said books pay the fine imposed by said order or satisfied the Court that you were unable to produce the same, is that true or is it not true?

A. I decline to answer for the same reasons.

Q. Is it not a fact that from an order so entered you took an appeal to the General Term of the Superior Court, being the Appellate branch of the Superior Court, and said order was affirmed by said General Term, and that from said order of the said General Term you took an appeal to the Court of Appeals being the highest Court in the State of New York, and that said order was affirmed by said Court, is that, or is that not true?

A. I decline to answer for the same reasons stated above.

Q. Is it, or is it not a fact that in the said proceedings an order was made by Geo. P. Andrews, one of the Justices of the Superior Court, appointing Henry B. Weselman

263 Receiver of the property of yourself and directing you to execute, acknowledge and deliver to said Receiver a valid assignment and conveyance of all your lands and real estate wherever the same are situated, is that or is that not a fact?

A. I decline to answer for the same reasons stated above.

Q. I show you what purports to be a certified copy of an order appointing Henry B. Weselman Receiver as stated, and ask you whether that order was not entered in the City of New York?

A. I decline to answer for the reasons above stated.

The complainant offers in evidence the certified copy of an order made in the suit entitled the Holly Manufacturing Com-

pany against Clarence H. Venner, appointing the Receiver of the property of Clarence H. Venner, which said copy is marked Complainant's Exhibit "7".

To which offer the defendants object as irrelevant, immaterial, and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

Q. Is it, or is it not a fact that in said supplementary proceedings a commitment duly issued to the Sheriff of the County of New York, directing him to take the body of said Clarence H. Venner, and him safely and closely to keep in his custody in the City and County of New York, and to be there detained in said custody until he should produce the books of account?

Objected to by Mr. Webster as irrelevant, immaterial and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

A. I decline to answer for the reasons above stated.

The Complainant offers in evidence a copy of the commitment in question, which said copy is marked Complain-
264 ant's Exhibit "8".

To which offer the defendants object as irrelevant, immaterial, and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

The Complainant also offers in evidence a copy of the supplementary proceedings upon which questions have been asked, which is marked Complainant's Exhibit "9".

To which offer the defendants object as irrelevant, immaterial and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

It is agreed that these papers, complainant's Exhibits "7", "8" and "9", offered in evidence by complainant's Counsel may be retained and produced on the trial.

Counsel for Complainants states that he proposes by the questions which the witness declines to answer to show that the witness is in contempt of the Superior Court of the State of New York, and to affect his credibility as a witness by such evidence and gives notice that in view of the refusal of the witness to answer the questions, he reserves the right to move to suppress his entire deposition for his failure to an-

swer the questions, and also will take such other measures to compel an answer as he may be advised.

265 Q. Mr. Venner, in certain places in your evidence you speak of the United Water Company, and others of the United Water Works Co. Limited, do you mean one or two corporations, by the different designation?

A. In all cases the reference is to one and the same corporation, The United Water Works Company, Limited.

George L. Venner, a witness produced in behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination

By Mr. Webster:

Q. State your name, age and residence?

A. George L. Venner; age 42; Boston, Mass.

Q. What office do you hold in the American Water Works Company of Illinois?

A. Secretary.

Q. How long have you been Secretary?

A. Since February, 1893.

Q. Since you have been Secretary of the American Water Works Company of Illinois, state whether or no any demand has been made upon that company by the Farmers Loan & Trust Company for the payment of matured coupons under the mortgage in suit?

A. Not to my knowledge.

Q. If any such demand had been made, would you by virtue of your office, know of that fact?

A. I should.

CERTIFICATE.

United States of America,
District of Nebraska—ss.

I, E. S. Dundy, Jr., Master and Examiner in Chancery, duly appointed by the Circuit Court of the United States for the District of Nebraska, in the Eighth Circuit, do hereby certify that the days named in the depositions hereto annexed,

266 I was attended at the offices named in the annexed testimony in the City of Omaha, New York, & Boston by the Counsel and Witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and signatures waived in my presence.

I further certify that exhibits 1 to 13, (true, exact and perfect copies of which are hereto attached, marked Exhibits 1

pany against Clarence H. Venner, appointing the Receiver of the property of Clarence H. Venner, which said copy is marked Complainant's Exhibit "7".

To which offer the defendants object as irrelevant, immaterial, and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

Q. Is it, or is it not a fact that in said supplementary proceedings a commitment duly issued to the Sheriff of the County of New York, directing him to take the body of said Clarence H. Venner, and him safely and closely to keep in his custody in the City and County of New York, and to be there detained in said custody until he should produce the books of account?

Objected to by Mr. Webster as irrelevant, immaterial and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

A. I decline to answer for the reasons above stated.

The Complainant offers in evidence a copy of the commitment in question, which said copy is marked Complain-
264 ant's Exhibit "8".

To which offer the defendants object as irrelevant, immaterial, and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

The Complainant also offers in evidence a copy of the supplementary proceedings upon which questions have been asked, which is marked Complainant's Exhibit "9".

To which offer the defendants object as irrelevant, immaterial and for the further reason that it is not cross-examination of any matter upon which this witness has been examined in chief.

It is agreed that these papers, complainant's Exhibits "7", "8" and "9", offered in evidence by complainant's Counsel may be retained and produced on the trial.

Counsel for Complainants states that he proposes by the questions which the witness declines to answer to show that the witness is in contempt of the Superior Court of the State of New York, and to affect his credibility as a witness by such evidence and gives notice that in view of the refusal of the witness to answer the questions, he reserves the right to move to suppress his entire deposition for his failure to an-

swer the questions, and also will take such other measures to compel an answer as he may be advised.

265 Q. Mr. Venner, in certain places in your evidence you speak of the United Water Company, and others of the United Water Works Co. Limited, do you mean one or two corporations, by the different designation?

A. In all cases the reference is to one and the same corporation, The United Water Works Company, Limited.

George L. Venner, a witness produced in behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination

By Mr. Webster:

Q. State your name, age and residence?

A. George L. Venner; age 42; Boston, Mass.

Q. What office do you hold in the American Water Works Company of Illinois?

A. Secretary.

Q. How long have you been Secretary?

A. Since February, 1893.

Q. Since you have been Secretary of the American Water Works Company of Illinois, state whether or no any demand has been made upon that company by the Farmers Loan & Trust Company for the payment of matured coupons under the mortgage in suit?

A. Not to my knowledge.

Q. If any such demand had been made, would you by virtue of your office, know of that fact?

A. I should.

CERTIFICATE.

United States of America,
District of Nebraska—ss.

I, E. S. Dundy, Jr., Master and Examiner in Chancery, duly appointed by the Circuit Court of the United States for the District of Nebraska, in the Eighth Circuit, do hereby certify that the days named in the depositions hereto annexed,

266 I was attended at the offices named in the annexed testimony in the City of Omaha, New York, & Boston by the Counsel and Witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and signatures waived in my presence.

I further certify that exhibits 1 to 13, (true, exact and perfect copies of which are hereto attached, marked Exhibits 1

to 13) were introduced in evidence in said cause during the taking of said deposition.

Dated Omaha, 21, Dec. 1894.

E. S. DUNDY, JR.,
Master and Examiner in Chancery.

FEES.

Depositions 459 Folios, at 20 cents per Folio	$ 91.80
Per diems 10 days	100.00
Swearing 5 Witnesses at 10 cents	50.00
Mileage to Boston & Return	0.00
13 Exhibits, at 10 cents each	1.30
Certificate	.35
	$--3.45

Upon the back of said Testimony appear endorsements in the words and figures following, to-wit:

96 "Q". The Farmers Loan & Trust Company vs. The American Water Works Company et al. Testimony taken on behalf of all parties. Filed Dec. 21, 1894. Elmer D. Frank, Clerk.

267 Thereupon afterwards, at the November 1894 Term of said Court, on the 2nd day of January, 1895, the following proceedings were had and done in said case as appears of record on folio 334, Journal "T" of said Court, to-wit:

Farmers Loan and Trust Company,
96 Q. vs.
American Water Works Company, et al.

On motion of the defendants by their solicitors leave is granted them by the Court to amend their answers herein in ten days from this date.

Thereupon afterwards, to-wit:—On the said 2nd day of January, 1895, an Amendment to the Answer of the American Water Works Co. of New Jersey, etc. hereinbefore filed, was filed in said case, which said Amendment to Answer is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

Farmers' Loan & Trust Company, Complainant,
vs.
The American Water Works Company (of Illinois), The American Water Works Company of (New Jersey), E. Hyde Rust as suspended Receiver, and Alonzo B. Hunt, temporary Receiver, Respondents.

Now comes the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, and

for amendment to their Answer hereinbefore filed, leave of Court having been grant--- thereunto, aver:

268 1. That said defendant the American Water Works Company of Illinois was not by law authorized on the first day of July, 1887, or in January, 1889, or at any other time to make or execute the mortgages or either of them in said bill of complaint described upon said system of water works, and was not by law authorized to secure the said alleged issue or series of bonds in said bill of Complaint described by any mortgage or deed of trust upon said system of water works in the City of Omaha; that said Company was not under and by virtue of its articles of Incorporation authorized or empowered to make or execute said mortgage upon said plant or any part thereof, nor was said Company authorized thereunder or by virtue of the laws of the State of Illinois, nor under and by virtue of the laws of the State of Nebraska, where said property was situated, to execute or make said mortgage upon said property, and said mortgage was an effort to create an indebtedness far in excess of the limit authorized by law: that is, in excess of two-thirds of the capital stock of said mortgagor company; that said mortgagor company's capital stock was and is only six hundred thousand dollars, ($600,000.) and it had no power or authority to create or incur a liability in excess of four hundred thousand dollars, ($400,000.) and that there already existed a prior mortgage upon said property of four hundred thousand dollars ($400,000.) which was the full limit of the Company's authority to become indebted.

2. That the said stockholders of said alleged mortgagor company never authorized said mortgage to be given on all the property therein decribed, and particularly did said stock holders not authorize a mortgage of said contract and franchise from the City of Omaha, and its said directors did not so authorize, and further aver that said Illinois Company could not in any event lawfully make a mortgage upon said property,

268½ especially the said contract with the City of Omaha, except upon the conditions and terms prescribed by the said City of Omaha which never agreed thereto, and except upon the further condition and terms that the said The American Water Works Company of Illinois and the said Complainants herein should maintain and operate the said water works plant and provide for the same and all thereof being kept a going concern for the entire time of the said contract with the said City of Omaha, and except upon the provision and condition that the said water works Company and the said Complainant and the several holders of the bonds issued under said alleged mortgage should agree and provide

for the furnishing of the necessary machinery, material, pipe, engines, hydrants and other necessary apparatus to enable said water works plant to be maintained and operated, and to keep and hold good its said franchises and contracts with the said City of Omaha. That said franchises and privileges granted to the said Sidney E. Locke, by the City of Omaha was a personal privilege granted to the said Sidney E. Locke for the use and benefit of the said City of Omaha and its inhabitants and subject to its control and so and under such terms and conditions and subject to such charges to said complainant accepted the said mortgage on said plant and the said City of Omaha never did, at any time, agree to the making of said mortgages, or the encumbering of said property or franchises, or to the assignment of said franchises, of all which facts the bondholders and trustee had notice.

3. That the defendant the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska did not and has not filed with the Secretary of State of the State of Nebraska, copies of its Articles of Incorporation as required by law in that behalf, and hence was not authorized to do or transact any business in the State of Nebraska.

269 4. That the organization of the American Water Works Company of Illinois was illegal and that the same was promoted and organized as a scheme or device to evade the provisions [or] and policy of the laws of the State of Nebraska, and that the organization of said Company was promoted by the persons who thus owned the stock of the said Water Works Company of Omaha, a Nebraska corporation as set forth in the original answer, and that the object and purpose of the said new corporation under the laws of Illinois was to transfer to it the water plant belonging to the said Nebraska corporation to the end that there might be conferred upon the new corporation organized under the laws of the State of Illinois enlarged and greater powers than could be exercised by it under the laws of the State of Nebraska, and that none of the persons having any real or substantial interests in the said Illinois corporation were either residents or citizens of the State of Illinois, and of all which facts the complainant herein and the bondholders by the terms of the said mortgage were bound to have had notice, and did in fact have notice, and that said bonds were not sold and delivered to bona fide holders for value.

5. That the Farmer's Loan & Trust Company, complainant herein, at the time when it pretended to accept deeds of trust

under said mortgage was not authorized or empowered so to do in that said mortgagor company was a corporation organized under the laws of the State of Illinois, and purported to execute its said mortgages under the laws of the State of Illinois, and that the complainant company had not and has not complied with the laws of the State of Illinois, to-wit: an Act entitled "An Act to provide for and regulate the administration of Trusts by Trust Companies" approved June 15th, 1887, and had not more particularly complied with Section Six of said Act which requires of such Trust Companies before accepting any appointment as Trustee to deposit with the Auditor of Public Accounts of the State of Illinois the sum of Two Hundred Thousand Dollars ($200,000.) in bonds of the United
270 States or of Illinois, or in mortgages on Illinois real estate, and that the said complainant company had not received any certificate of authority from the Auditor of Public Accounts of the State of Illinois reciting that said complainant company had complied with the requirements of said Act in respect to said deposit, and was thereby prohibited from accepting said trust, and by reason of the premises aforesaid the said complainant company was not authorized and is not now authorized to act in the capacity of Trustee under said mortgage nor to maintain this Bill to foreclose the said mortgage, and of all which facts the bondholders were bounden in law to take notice.

AMERICAN WATER WORKS CO., (of Ill.) and
AMERICAN WATER WORKS COMPANY (of New Jersey)
By JNO. L. WEBSTER,
Their Solicitor.

JNO. L. WEBSTER, of Counsel.

Upon the back of said Amendment to Answer appear endorsements in the words and figures following, to-wit: Q 96. U. S. Circuit Court, District of Nebraska. Farmers Loan & Trust Co., Complainant, vs. The American Water Works Co. (of Illinois), The American Water Works Co. (of New Jersey). E. Hyde Rust as Suspended Receiver and Alonzo B. Hunt, Temporary Receiver, Respondents. Amendment to the Answer. Filed Jan. 2, 1895. Elmer D. Frank, Clerk. Jno. L. Webster, Sol. for defendants.

Thereupon afterwards, to-wit: On the 21st day of January, 1895, Replication of Farmers Loan & Trust Company to the Answer of A. B. Hunt Temporary Receiver was filed in said

case, which said Replication is in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

271 Farmer's Loan & Trust Company,
In Equity. 96 Q. vs.
American Water Works Co. (of New Jersey) et al.

The replication of Farmers Loan & Trust Company plaintiff to the answer of A. B. Hunt Temporary Receiver defendant.

This repliant replying and reserving unto itself now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said Answer, for replication thereunto, say that they will aver, maintain and prove its said Bill of Complaint to be true, certain and sufficient in the law to be answered unto, and that the said Answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said Answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by its said Bill of Complaint it has already prayed.

HALL & McCULLOCH,
Solicitors for plaintiff.

Upon the back of said Replication appear endorsements in the words and figures following, to-wit: No. 96 Q. U. S. Circuit Court, District of Nebraska. In Equity. Farmers Loan & Trust Co. vs. American Water Works Co. et al. Replication. Filed Jan. 21, 1895. Elmer D. Frank, Clerk. Hall & McCulloch, Solicitor for plaintiff.

Thereupon afterwards, to-wit: On the said 21st day of January, 1895, a Replication of Farmers Loan & Trust Com-
272 pany to the Amended Answer of American Water Works Company of New Jersey, and the American Water Works Company of Illinois was filed in said case, which said Replication is in the words and figures following to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Farmer's Loan & Trust Co.
In Equity. 96 Q. vs.
American Water Works Co. of New Jersey, et al.

The replication of Farmers Loan & Trust Company plaintiff to the Amended Answer of American Water Works Co. of New

Jersey and the American Water Works Co. of Illinois, defendants.

This repliant saving and reserving unto itself now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said Answer, for replication thereunto, say that they will aver, maintain and prove its said Bill of Complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by its said Bill of Complaint it has already prayed.

273

HALL & McCULLOCH,
Solicitor for plaintiff.

Upon the back of said Replication appear endorsements in the words and figures following, to-wit: No. 96 Doc. Q. U. S. Circuit Court, District of Nebraska. In Equity. Farmer's Loan & Trust Co. vs. American Water Works Co. et al. Replication. Filed Jan. 21, 1895. Elmer D. Frank, Clerk. Hall & McCulloch, Solicitors for plaintiff.

Thereupon afterwards, to-wit: On the 12th day of March, 1895, a Stipulation was filed in said case, which said Stipulation is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

STIPULATION.

Farmer's Loan & Trust Company, Complainant,

vs.

American Water Works Company, et al., Defendants.

It is stipulated and agreed by and between the Farmer's Loan & Trust Company, The American Water Works Company of Illinois, The American Water Works Company of New Jersey and Alonzo B. Hunt, temporary Receiver, defendants, that the following facts are taken and admitted to be true in the above entitled cause:

No. 1. That at the time of the commencement of this suit, and for more than ninety days prior thereto, there had been

due and unpaid a large amount of interest upon the bonds in controversy, exceeding fifty thousand dollars.

No. 2. That the Complainants may produce and read on the hearing in this cause a certificate from the books of the Farmer's Loan & Trust Company showing the exact amounts and dates of such defaulted interest, and a certificate of coupons presented for payment and unpaid.

274 No. 3. It is also agreed that the showing called for by the mortgage in controversy before bonds should be delivered was made to the Trustee before the certification and issuance of the bonds in controversy.

No. 4. It is further agreed that Venner negotiated and sold a large part of the bonds in controversy; that both the New Jersey and the Illinois Companies have paid large sums of interest on said bonds.

No. 5. And that the request of the bondholders to bring suit may be offered and read in evidence on this hearing.

No. 6. That the City of Omaha has paid water rent according to the terms of the ordinance between Locke and the City of Omaha, down to the first day of January, 1895.

No. 7. On the hearing certified copies of the proceedings in New Jersey in the Receivership of Rust may be offered, and also records relating to removal of Rust and appointment of Hunt.

No. 8. It is further stipulated and agreed that the Farmer's Loan & Trust Company did not make any deposit of money, government bonds or other securities to the amount of $200,000, or any other amount, in the office of the Auditor of Public accounts in the State of Illinois, and did not receive any certificate from said Auditor prior to its acting as Trustee under the mortgage and bonds at issue in this suit, and has not up to this date.

No. 9. That Alonzo B. Hunt, Temporary Receiver, was in possession of the property in Douglas County, covered by Mortgage in suit from his appointment as temporary Receiver until the commencement of this suit.

No. 10. That the city of Omaha has made no formal consent to the execution of the mortgage in controversy, by either ordinance or resolution of Mayor and Council.

This stipulation signed with the understanding that it closes the proofs in the case between the parties hereto, and if the

Complainants shall take further proofs then this stipu-
275 lation be null and void.

FARMERS LOAN & TRUST COMPANY,
By R. S. HALL its Counsel.

March 11th, 1895.

JNO. L. WEBSTER,
Sol. for the American Water Works Company (of Ill.) American Water Works Company (of New Jersey) and

ALONZO B. HUNT,
Temporary Receiver

Upon the back of said Stipulation appear endorsements in the words and figures following, to-wit: Docket Q. No. 96. U. S. Circuit Court, District of Nebraska. Farmers Loan & Trust Co., plaintiff, vs. The American Water Works Co. et al., defendants. Stipulation. Filed March 12, 1895. Elmer D. Frank, Clerk. Jno. L. Webster, Attorney for Defendant.

Thereupon afterwards, to-wit: On the 6th day of May, 1895, Testimony on behalf of Respondents was filed in said case, which said Testimony is in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Farmers' Loan & Trust Company, Complainant,

vs.

The American Water Works Company, et al., Respondents.

Testimony taken in behalf of the Respondents, The American Water Works Company (of Illinois), The American Water Works Company (of New Jersey) and A. B. Hunt, Temporary Receiver, at the office of John L. Webster, in the City of Omaha, this the 14th day of January, 1895.

276 Present, Joseph R. Clarkson, representing the Complainant, and John L. Webster, representing the above named Respondents.

Testimony taken at said time and place by consent of parties.

Clarence H. Venner, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being duly examined and cautioned by me, deposes as follows, viz:

Examined

By Webster.

Q. Are you the same Clarence H. Venner who was heretofore examined in this case on behalf of the defendants, and

were you familiar with the organization of the corporation known as the American Water Works Company incorporated under the laws of the state of Illinois, to-wit, the mortgagor Company?

A. I was.

Q. Who were the promoters of that enterprise?

Clarkson: Complainant objects to the question as incompetent, immaterial and irrelevant under the issues in this case.

A. Principally myself and S. L. Wiley, though William A. Underwood was associated with us.

Q. At that time who owned the stock of the City Water Works Company of Omaha?

Clarkson: Complainant objects to the question as incompetent, immaterial and irrelevant under the issues in this case.

A. The American Water Works Company (of Illinois) was incorporated I think about the first of April, 1887; at that time Underwood, Wiley and myself were the owners of about five-eighths of the capital stock the money for which had been furnished by me. Subsequently and before July 1,
277 1887, we had purchased the balance of capital stock, some $300,000, with funds furnished by myself.

Q. Who was president of the City Water Works Company of Omaha at that time?

Clarkson: Complainant objects to the question as incompetent, immaterial and irrelevant under the issues in this case.

A. William A. Underwood.

Q. What was the purpose of forming the corporation known as the American Water Works Company under the laws of the State of Illinois?

Clarkson: Complainant objects as incompetent, immaterial and irrelevant under the issues in this case.

A. We found that the laws of Nebraska would seriously embar-ass us in carrying out our plans for financiering the enterprise and we desired to get into some State, or incorporate in some state where the laws were more liberal than in Nebraska.

Q. Who was acting as your legal adviser preliminary to the organization of the Illinois Company?

Clarkson: Complainant objects as incompetent, irrelevant, immaterial under the issues in this case.

A. William A. Underwood.

Q. I hand you two communications, one being a letter and the other a telegram, and ask you to state whether these two documents came from the same William A. Underwood referred to by you?

A. They did.

Q. I will ask you further to state whether you were controlled by and acted by reason of the suggestions stated by you heretofore in your evidence as well as by the suggestions stated in the said letter and telegram in going on in the enterprise and reorganization of the Company under the laws of Illinois?

278 Clarkson: Complainant objects as incompetent, irrelevant, immaterial under the issues.

A. I was.

Webster: The defendant offers said letter and telegram in evidence to be marked Exhibits "1" and "2".

Clarkson: Exhibits "1" and "2" are each and both objected to by complainant as being incompetent, irrelevant and immaterial.

(The following are copies of Exhibits "1" and "2".)

EXHIBIT "1".

Wiliam A. Underwood,
Counsellor at Law.
Room 61, Buhl Block.

Detroit, Mich. Nov. 27, 1886.

C. H. Venner, Esq.,
8 Congress Street,
Boston, Mass.,

My Dear Venner. There is nothing in the laws of Illinois which limits the amount of indebtedness which a corporation may incur.

I will prepare the Alton mortgage at once.

I am engaged on the affidavit I wrote you about from St. Louis and also on Omaha papers. I am inclined to think a lease something like the one sustained by the Courts as against stockholders and creditors in the case of a leasing both the New York and Metropolitan Elevated Railways to the Manhattan. That Company, the Manhattan, was formed practically to take the lease of the New York and Metropolitan Companies. The main thing to be careful about is that the corporation should be one in which no one interested

in the present company, has any apparent interest or on which can be traced and it should be formed at once.

I may have to postpone matters at Hartford for a week, Mrs. Underwood's mother is not expected to live, at Atlanta,
279 and Mrs. Underwood went there this morning. In case of any serious termination of her illness she would be brought north for burial and I ought not to be away.

I shall find time in the course of to-day and Monday to write you further about the matters in which I am engaged.

Yours truly,

W. A. UNDERWOOD.

A telegram from Dumont this A. M. says will take the cash on his note—(I gave him my note for 1400 and 6 per cent interest to June 1st). He will discount it at 6 per cent; As I understand it you want Dumont to transfer his shares to you paying him the $7000.00 still due him.

W. A. U.

EXHIBIT "2".

Number 412. Sent by Jy. Rec'd by S. 632 42 Pd. 75 Dlr. Dated Detroit, Mich. 29.

Rec'd at 177 Devonshire St. Boston.

Nov. 29, 1886.

T. C. H. Venner,
Brunswick [Ho.]

Directors in ordinary corporations Illinois need not be citizens. Directors can mortgage, no assent stockholders required, meeting of directors to mortgage had best be held there, there ought to be enough directors within reach, so that one from abroad could make quorum.

W. A. U.

Q. I wish to call your attention to the names of the persons who [support] to be the incorporators of the Illinois Company, to-wit: Henry I. Beer, Henry L. Hopkins, and Joseph A. Griffith, and ask you to state what financial interest, if any, those persons had in the Illinois Company?

280 Clarkson: Complainant objects as incompetent, irrelevant and immaterial under the issues.

A. They had no interest and were mere dummies.

Clarkson: Complainant moves to strike out the answer as being the conclusion of the witness.

Q. I call your attention to the purported subscription to the Capital Stock of Henry L. Hopkins, Frederick W. Short

and Edmund C. Short, and ask you to state what financial interest if any they had as stockholders in the Illinois Corporation?

Clarkson: Complainant objects as incompetent, immaterial and irrelevant and calling for the conclusion of the witness.

A. None whatever.

Q. Whose financial interest did they represent in subscribing for the shares of stock?

Clarkson: Complainant objects as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, which objections shall apply to all questions relating to the Illinois Company?

A. A Syndicate composed of W. A. Underwood, S. L. Wiley and myself.

Q. Did any of the three persons, to-wit: Underwood, Wiley and yourself, live in the State of Illinois at that time or at any other time?

A. No sir.

Q. Did the American Water Works Company (of Illinois) ever own any property or do any business in the State of Illinois aside from the mere holding of the stockholders and directors meetings?

A. No business except that connected with the Omaha property and never held any property in Illinois.

281 Q. At the time when this Company was organized was [at] it the intention of its promoters to own or transact business in the State of Illinois?

A. No sir; the whole purpose of the Illinois organization was to operate the Omaha plant.

Q. Were you one of the promoters of the American Water Works Company (of New Jersey)?

Clarkson: Complainant objects as incompetent, irrelevant and immaterial under the issues and the same objection shall apply to all questions asked relating to the New Jersey Corporation.

A. I was.

Q. What was the purpose of the organization of the New Jersey Company?

A. To consolidate the Water Plants at Omaha and Denver and combine them in one Company.

Q. Were the persons who became the owners of the stock in the New Jersey Company the persons who owned the stock in the Denver Company and the Omaha Company?

A. Yes sir, they were.

Q. And did the Company ever own any Water Plant in the State of New Jersey?

A. No sir.

Q. Or ever transact any business in the State of New Jersey aside from its mere corporate meetings?

A. That is all.

Webster: The defendants introduce in evidence copies of the original articles of Incorporation of the City Water Works Company of Omaha, which are hereto attached, marked Exhibit "3".

282 Clarkson: Com-lainant objects as incompetent, irrelevant and immaterial under the issues.

Webster: The defendant offers in evidence a certified copy of the order removing E. Hyde Rust as Receiver of the Water Works Plant at Omaha, and appointing A. B. Hunt as Temporary Receiver, which is hereto attached marked Exhibit "4".

Clarkson: The Complainant objects as incompetent, irrelevant and immaterial under the issues.

(Following are copies of Exhibits "3" and "4".)

EXHIBIT "3"

Articles of Incorporation
of
City Water Works Company, of Omaha.

Articles of Incorporation.

The undersigned hereby associate themselves together for the purpose of forming a Corporation.

The name of the company shall be the City Water Works Company of Omaha.

The principal place of transacting its business shall be the City of Omaha, Douglas County, Nebraska.

The general nature of the business shall be the construction, maintenance and operating water works in the City of Omaha.

The amount of capital stock shall be Six Hundred Thousand (600,000) Dollars divided into shares of One Hundred (100) Dollars each and which shall be paid in as called for by the Board of Directors.

The time of Commencement of this Corporation shall be July, Twenty-second (22) A. D. Eighteen Hundred eighty (1880), and the termination July, Twenty-second (22) A. D. Nineteen Hundred seventy (1979.)

The highest amount of indebtedness or liability to which the corporation is at any time to subject itself shall be Four Hundred Thousand ($400000) Dollars.

283 The affairs of the corporation are to be conducted by a Board of Five (5) Directors and such other officers as the Board may elect or appoint.

Signed at Omaha, Nebraska, this Twenty-second (22) day of July A. D. Eighteen Hundred Eighty -1880.-

J. T. CLARK.
N. SHELTON.
MILTON ROGERS.
SAMUEL R. JOHNSON.
S. E. LOCKE.
C. H. DEWEY.

State of Nebraska,
County of Douglas—ss.

Be it remembered, that on this 22nd day of July, A. D. 1880, at Omaha, Nebraska, before me, a Notary Public, duly appointed, commissioned and qualified, within and for the County of Douglas and State of Nebraska, personally appeared J. T. Clark, N. Shelton, Milton Rogers, Samuel E. Johnson, S. E. Locke and C. H. Dewey, to me personally known to be the identical persons who signed the foregoing Articles of Incorporation and they each acknowledged the same to be their voluntary act and deed.

In testimony whereof, I have hereunto set my hand and official seal this 22nd day of July, A. D. 1880.

THOMAS S. McMURRAY,
Notary Public.
Douglas County, Nebraska.

Thomas S. McMurray,
Notarial Seal
Douglas County, Nebraska.

284 Recorded July 24th, 1880, at 4 3/4 o'clock P. M.

JOHN R. MANCHESTER,
County Clerk.

State of Nebraska,
Douglas County—ss.

I, Fred J. Sackett, County Clerk, in and for said State and County, do hereby certify that I have compared the above and foregoing Articles of Incorporation as it appears of record in

Book A of Incorporation Record on page 392 and the same is a true and correct copy thereof.

Witness my signature and the seal of said County at Omaha, this 16th day of January, A. D. 1895.

[Seal] FRED J. SACKETT,
County Clerk.
By M. H. REDFIELD, Deputy.

EXHIBIT "4".

At a session of the Circuit Court of the United States for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the 15th day of July, 1893, the Honorable Elmer S. Dundy, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

The Denver City Water Works Company, et al.,
vs.
The American Water Works Company et al.

285 It being made to appear to the Court by the Petition of the United Water Works Company Limited. That E. Hyde Rust has departed from the jurisdiction of this Court, and has taken with him the certain Vouchers—in the said petition more particularly set forth—executed by him as Receiver of the American Water Works Company, and for other reasons more particularly set forth in the Petition filed herein for the removal of said E. Hyde Rust, Receiver, and also in the Petition this day filed herein asking for the suspension of E. Hyde Rust as Receiver—it is ordered that E. Hyde Rust be suspended and removed as Receiver of the Omaha Water Works Plant of the American Water Works Company of New Jersey, pending the proceedings for his removal.

It is further ordered that Alonzo B. Hunt be and is hereby appointed temporary Receiver of the American Water Works Company of New Jersey. He to give Bond in the sum of $10,000. and that he pay money into Court from time to time after the payment of current expenses, such surplus to be paid into Court once a week.

It is further ordered that said Alonzo B. Hunt as Temporary Receiver do not make any material change in the management of the affairs of the office during his term of appointment.

It is further ordered that E. Hyde Rust and his employees and others in charge of said office do turn over to said Alonzo B. Hunt all the Books, accounts, money, vouchers and property

of every kind and nature whatsoever belonging to said Water Plant or in any way connected therewith and they be and are hereby enjoined from in any manner interfering with said Alonzo B. Hunt in his management of said Water Plant as such Receiver until the further order of the Court, and that said E. Hyde Rust and his assistants be enjoined from collecting any Hydrant rent, or water revenues until the further order of the Court.

(Signed) ELMER S. DUNDY, Judge.

286 United States of America,
District of Nebraska—ss.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify, that the above and foregoing is a true copy of an order entered upon the Journal of the proceedings of said Court, in the cause therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom, and of the whole thereof.

Witness, my Official Signature, and the Seal of said Court, at Omaha, in said District, this 16th day of Jany A. D. 1895.

[Seal] ELMER D. FRANK, Clerk.

CERTIFICATE.

United States of America,
District of Nebraska—ss.

I, E. S. Dundy, Jr., Master and Examiner in Chancery, duly appointed by the Circuit Court of the United States for the District of Nebraska, in the Eighth Circuit, do hereby certify that the day named in the deposition hereto annexed, I was attended at my office named in the annexed notice in the City of Omaha, by the Counsel and witness aforesaid; That the said witness was duly sworn and examined, and the deposition was reduced to writing and read to the witness and signature waived in my presence.

I further certify that Exhibits 1 to 4 (true, exact and perfect copies of which are hereto attached, marked Exhibits 1 to 4) were introduced in evidence in said cause during the taking of said deposition.

287 Dated Omaha, 5th May, 1895.

E. S. DUNDY, JR.,
Master and Examiner in Chancery.

FEES.

Depositions 54 Folios, at 20 cents per Folio	$10.80
Per diem.	5.00
Swearing 1 Witness at 10 cents	.10
4 Exhibits at 10 cents each	.40
Certificate	.35
	$16.65

Upon the back of said Testimony appear endorsements in the words and figures following, to-wit:

No. 96. Doc. Q. In the Circuit Court of the United States for the District of Nebraska. Farmers' Loan & Trust Company, Complainant, vs. The American Water Works Company, et al., Respondents. Testimony on behalf of Respondents. Filed May 6, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, on the 7th day of May, 1895, Testimony on behalf of Complainants was filed in said case, which said Testimony is in the words and figures following, to-wit:

In the United States Circuit Court, District of Nebraska.
Farmers Loan & Trust Company, Complainant,
vs.
American Water Works Company, Defendant.

It is hereby agreed that the plaintiff shall have leave
288 at this time to take testimony touching the property owned by the American Water Works Company at Omaha Nebr. and that the defendants shall have leave within ten days from the date of the close of taking the testimony of the plaintiff to take such proofs as in the opinion of their solicitor may be advisable, either in rebuttal or explanatory of such testimony as shall be taken by the plaintiff.

W. A. UNDERWOOD, and
R. S. HALL,
Appearing for the [the] Complainant,
and J. L. WEBSTER for Respondent.

F. H. Marshall, sworn for the plaintiff, examined in chief by Mr. Underwood testified as follows:

4 Q. What is your age?
A. 35 years.
5 Q. How long have you lived in Omaha?
A. Five years.
6 Q. How long have you been employed by the Water Works Company?
A. Five years.

7 Q. As what?

A. The first part of the time as rodman and the last three years as engineer.

8 Q. You are acquainted with the property of the Company?

A. Yes sir.

9 Q. The property of the Company at Florence?

A. Yes sir.

10 Q. Look at the map I now show you and state who made it?

A. I made that map.

11 Q. And the property within the red lines of the map state whether or not that is the property that has been occupied by the American Water Works Company in Florence?

A. Yes sir.

289 12 Q. It has been occupied by the American Water Works Company?

A. Yes sir.

13 Q. I now call your attention to a description of the property which is contained in the 5th paragraph of the plaintiff's bill of complaint in this case as follows: Beginning at a point 85 feet south of the Northwest corner of Block 127 of the City of Florence, as surveyed, platted and recorded, do you find that point on the [may]?

A. Yes sir.

14 Q. Will you please mark that "A"?

A. Yes sir.

15 Q. Running south 795 feet to the right of way of the Chicago St. Paul, Min-eapolis & Omaha R. R.?

A. Yes sir.

16 Q. Thence in a southerly and easterly direction along such right of way a three degree curve to a point north 867 feet, end of curve, thence south 263 feet, thence East 105 feet thence south 2,365 feet to the right of way of the aforesaid C. St. P. M. & O. R. R.?

A. Yes sir.

17 Q. Thence in a Southeasterly direction along said right of way 70 feet?

A. Yes sir.

18 Q. Thence East 935 feet to the Southwest corner of Block numbered 263 of the City of Florence as surveyed, platted and recorded?

A. Yes sir.

19 Q. Thence North 1,300 feet, thence east 660 feet, thence North 195 feet more or less to the west bank of the Missouri River, thence in a northeasterly and northerly direction along the bank of said river until intersecting with the East and

West line to the Northwest corner of block 127, said
290 line being the same as the North line of said block and the south line of Bridge Street of the City of Florence as surveyed, platted and recorded, will you mark that point w-ere the river bank intersects with the North line B. (here witness marks place) Thence west 595 feet more or less and thence in a southwesterly direction 175 feet to the point of beginning containing 125 acres of land more or less?

A. Yes sir.

20 Q. That is the land enclosed in the red lines on the map?

A. Yes sir. Instead of Northeasterly [is] is northwesterly.

21 Q. It is along the bank of the river?

A. Yes sir.

22 Q. And whole lots 1, 2, 4, 5, 8, in Block No. 2?

A. Yes sir.

23 Q. And the whole of Block 260 of the City of Florence as surveyed, platted and recorded?

A. Yes sir.

24 Q. In addition to the land that I have described to you do you know whether the American Water Works Company was occupying and the Receiver since that time was occupying lot No. 7, in Block No. 2?

A. Yes sir.

25 Q. What did they have on there?

A. The Engineers house.

26 Q. Built by whom?

A. The Company.

27 Q. The American Water Works Company?

A. Yes sir.

The map referred to is offered in evidence and the same is marked Ex. A. C. A. P.

The plaintiff offers in evidence a deed from the City Water Works Company of Omaha, to the American Water
291 Works Company, made the first day of July 1887. The same is marked Ex. B. C. A. P.

28 Q. What is that?

A. That is a map of Block B. Reservoir Addition.

29 Q. Showing the property of the American Water Works Company?

A. Yes sir.

30 Q. What property, the Reservoir site?

A. Yes sir.

31 Q. In the City of Omaha?

A. Yes sir.

32 Q. I read to you the first description on the deed marked (Exhibit B.) which was just offered in evidence: "First beginning at the intersection of the East line of Lowe Avenue and the South line of Hamilton Street in said City, thence easterly along the South line of Hamilton Street in said City thence easterly along the South line of Hamilton Street six hundred and four (604) feet?

33 Q. Thence South four hundred and six 8-10 (406 8-10) feet to a point one hundred and sixty (160) feet North of the half section line?

A. Yes sir.

34 Q. Thence Westerly parallel with the half section line six hundred and four (604) feet to the east line of Lowe Avenue?

A. Yes sir.

35 Q. Thence North along the east line of Lowe Avenue four hundred and 3-10 (44 3-10 feet to the place of beginning?

A. Yes sir.

36 Q. That is a part of reservoir site?

A. Yes sir.

292 37 Q. Beginning at the intersection of the East line of Lowe Avenue with the North line of Nicholas Street, thence North two hundred and ninety-eight (298) feet; thence east Six hundred and four (604) feet; thence South 298 feet; thence west six hundred and four (604) feet to the place of beginning?

A. Yes, sir.

38 Q. Third, Beginning at the intersection of the West line of Pleasant Street with the South line of Hamilton Street, thence Westerly Four hundred and thirty-eight feet (438); Thence South seven hundred and four 8-10 (704 8-10) feet to the North line of Nicholas Street; thence east four hundred and thirty three feet (433) to Pleasant Street; thence north seven hundred and twenty-five feet (725) to the place of beginning?

A. Yes sir.

39 Q. Those three descriptions cover the Reservoir site?

A. Yes sir.

40 Q. What is that occupied for?

A. Business and Pump house.

Another map is produced and offered in evidence. The same is marked Ex. C. C. A. P.

41 Q. I show you another map, do you know that map, (referring to the map marked Ex. C. C. A. P.)?

A. Yes sir.

42 Q. Did you make it?

A. Yes sir.

43 Q. What is [—] a map of?

A. It is a map of our pumping station and business in the City of Omaha. The old pumping station.

44 Q. Is that station still in use?

A. Yes sir.

293 45 Q. I call your attention to the 4th description in the last mentioned deed. Lots 1, 2, 3, 4, 5, 6, 7, and 8 in Block Q. City of Omaha, according to the recorded plat thereof, and lots 1, 2, 5 and 6 in block 238 in the City of Omaha according to the recorded plat thereof?

A. Yes sir.

46 Q. That constitutes the company's property at that [plave]?

A. Yes sir.

47 Q. The Company also occupies other property used in that business near that place?

A. Yes sir.

48 Q. What is the description of that property?

A. It is marked as block P. and a part of Block O.

49 Q. As shown by the red lines on this map?

A. Yes sir. As shown by the dotted red lines.

50 Q. I will call your attention to the 5th description of the lots, the north fifty feet of lot 18, a strip of land beginning at the Northwest corner of Lot 17 in Block 2 in Armstrong's First Addition to the City of Omaha, thence east on the North line on said lot ten feet south parallel with the west line of said lot fifty (50) feet, thence west to the west line of said lot ten feet, thence North along the west line of said lot to the place of beginning fifty feet, all of said land being in block 2 Armstrong's first addition to the City of Omaha as surveyed, platted and recorded?

A. Yes sir.

51 Q. Do you know that property?

A. Yes sir.

52 Q. Do you know what it is used for?

A. No, I do not.

The map marked exhibit C. is offered in evidence.

294 A. B. Hunt, sworn for the plaintiff, examined in chief by Mr. Underwood, testified as follows:

53 Q. How long have you been connected with this Water Company plant in Omaha?

A. Since the fall of 1880.

54 Q. It was then in the process of construction?

A. Yes sir.

55 Q. The plant was then being constructed and owned by whom?

A. The City Water Works Company of Omaha.

56 Q. And you continued with it during the time it was owned by the American Water Works Company of Illinois?

A. Yes sir.

57 Q. And the American Water Works Company of New Jersey?

A. Yes sir.

58 Q. And since that time you have been one of the receivers?

A. Yes sir.

59 Q. During the time that it was owned by the City Water Works Company of Omaha and the American Water Works Company of Illinois and the American Water Works Company of New Jersey and before the appointment of the receivers what was your capacity?

A. Superintendent of the American Water Works Company.

60 Q. Will you state whether there is any public water supply in the City of Omaha other than this?

A. No, there [—] no other.

61 Q. And whether all the mains, pipes, valves hydrants and other ap-aratus for the distribution of water in the streets and public places of Omaha are the property of the American Water Company?

295 A. Yes, all the mains are.

62 Q. And valves?

A. Yes sir.

63 Q. And the hydrants?

A. Yes, fire hydrants.

64 Q. And all the public mains?

A. Yes sir.

65 Q. There are no other water mains owned by any other water supply company in the State?

A. No sir. not any public.

66 Q. And there is no other private supply used in pipes through the City except the pipes of customers attached to these pipes of this Company?

A. No sir.

67 Q. Do you know in regard to building the water works in South Omaha?

A. Yes sir.

68 Q. State whether there is any other water supply in South Omaha?

A. No, there is no other public water supply that I know of.

69 Q. If there were any would you know it?

A. I think I would, yes sir.

70 Q. And the water mains, valves, hydrants and other apparatus for distributing water in South Omaha are also the property of this Company?

A. Yes sir.

71 Q. Do you know whether the American Water Works Company put in a system of water works for the City of Florence?

A. They did.

72 Q. And is there any other public works there?

A. No, no other public works.

296 73 Q. And water mains, pipes, valves and hydrants and other ap-aratus in. the srteets of Florence are the property of this Company?

A. Yes sir.

74 Q. I ask you in regard to East Omaha, on the property of the East Land Company whether this Company put an extension in of their system there?

A. Yes sir.

75 Q. Do you remember when that was?

A. I do not remember the year. It was about four or five years ago.

76 Q. Do you remember when they put out any in Florence?

A. It was either 1890 or 1891. I would not be positive which.

77 Q. In regard to the water mains and pipes, valves and hydrants and other apparatus in East Omaha do you know whether these belong to this Company or not?

A. Yes sir.

78 Q. No other public water supply there?

A. No sir.

The plaintiff offers in evidence a deed from Eli S. Smoots to the American Water Works Company dated the 30th day of November 1889, recorded the second day of December 1889 in book 131 of deeds page 431 and marked Exhibit E.

79 Q. I read you the description in that deed: "The west Twenty-five (25) acres of South one half (1-2) of the Northeast Quarter (1/4) of section seven (7) township fifteen (15) North of range thirteen (13) east of the sixth principal meridian. Do you know that land?

A. Yes, I recognize it.

80 Q. Do you know what that land was acquired for?

A. For the purpose of erecting a large reservoir in the future.

297 81 Q. When it was needed?

A. Yes sir.

82 Q. State whether it is suitable for a reservoir site?

A. Yes, sir. It is evidently [the] adapted for a reservoir site by reason of its elevation and it is the best piece of ground they could find in the City. I looked it up myself. It is about 20 feet higher than the present reservoir site.

The plaintiff offers in evidence a deed from Herman Kountz and Elizabeth Kountz his wife of Omaha, Nebr. made the 13th day of September, 1889, and the same is marked Exhibit F.

The plaintiff offers in evidence deed from Charles B. Kountz and wife to the American Water Works Company, dated the 16th day of September, 1889. The same is marked exhibit G.

83 Q. I read [the] you the description from Exihibit F., Lot No. 7. Block 17, Koutz & Ruth's addition to the City of Omaha, as surveyed, platted and recorded, and in Exhibit G. Lot No. 10, Block No. 17, Kountze and Ruth's addition to the City of Omaha, as surveyed, platted and recorded, do you know that property, lots seven and ten in Block 17?

A. I am not positive about the block. I can tell by referring to the plat.

84 Q. If you would wish I would like for you to refer to a map of lots 7 and 10 in Block 17 Kountze and Ruth's Addition to the City of Omaha, as surveyed, platted and recorded? (Witness consults map) Are you able to state?

A. They are now occupied by our pumping station.

85 Q. Where you re-pump to South Omaha?

A. Yes, and the high grounds of South Omaha.

298 86 Q. Water which is furnished to Florence and to South Omaha and East Omaha all comes from the central Pumping stations of the American Water Works Company's plant which supplies Omaha?

A. Yes sir.

87 Q. In other words they have not separate water supplies?

A. No, they all come from one.

88 Q. The system of water works in Omaha and South Omaha and Florence are one system?

A. Yes sir.

89 Q. Will you state whether all of the property of the company, its real estate, mains, pipes, valves etc. are all suitable and in use or for the use of the water system?

A. Yes, they are the best we could get for that purpose.

The plaintiff offers in evidence a deed made by the American Water Works Company a corporation organized under the laws of the State of Illinois of the first part to the American Water Works Company a corporation organized under

the laws of the State of New Jersey, of the second part, dated the 24th day of April, 1891, recorded the 7th day of October, 1891, the Book 157 of deeds page 195 marked exhibit H.

The plaintiff offers in evidence a deed made by the American Water Works Company, a corporation of the State of Illinois of the first part, to the American Water Works Company a corporation organized under the laws of the State of New Jersey of the Second part, dated on the 24th day of April, 1891, and recorded on the 7th day of October 1891, on Book 10 of Miscellaneous records page 433, marked exhibit 1.

299 90 Q. After the property was conveyed to the American Water Works Company in New Jersey in April, 1891, there was no other real estate acquired?

A. No, none since then.

Omaha, Nebr. Nov. 9th, 1894.

The taking of testimony resumed pursuant to adjournment.

Cross-examination of F. H. Marshall.

By Mr. Webster.

91 Q. I desire to call your attention to the answers you gave touching the description of [ptoperty] in the deed from the City Water Works Company as follows, to-wit: Beginning at the intersection of the East line of Lowe Avenue and the South line of Hamilton Street in said City, thence easterly along the South line of Hamilton Street 604 feet, thence south 406.4 feet to a point one hundred and sixty feet North of the half section line; thence westerly parallel with the half section line 604 feet to the east line of Lowe Avenue, thence north along the line of Lowe Avenue 400.3 to the place of beginning?

A. Yes sir.

92 Q. Does that description so far include the ground covered by the reservoir and the pump house at what is known as Wall Nut Hill?

A. Yes sir.

93 Q. Does the map which you produce and which was offered in evidence as Exhibit "C" show the boundary lines as set down in the description just read to you?

A. They do not appear except the street boundary lines.

94 Q. Can you trace on the map a red line that will show the property included in the description above read to you?

A. Yes sir.

95 Q. Will you please do so?

A. Yes sir.

300 96 Q. Taking the next description of the Wall Nut Hill property beginning at the intersection of the line

of Lowe Avenue with the North line of Nicholas street, thence [Horth] 298 feet thence east 640 feet thence south 298 feet thence west 604 feet to the place of beginning, I ask you to state whether any of that property is covered by the reservoirs or pump house?

A. No sir.

97 Q. Does that property so described all lie to the South of the reservoirs and pump house and between that property and Nicholas Street?

A. Yes sir.

98 Q. Take the third description. Beginning at the intersection of the west line of Pleasant street with the south line of Hamilton street, thence Westerly 438 feet thence South 704 feet and eight tenths of a foot to the North line of Nicholas Street, thence East 433 feet to Pleasant street, thence North 725 feet to the place of beginning. State whether that property all lies to the east of the reservoir and pump house and between that and Pleasant Street?

A. Yes sir.

99 Q. Those two descriptions of property then are outside of what you are to enclose within the red lines?

A. Yes sir.

100 Q. Have you prepared a blue print covering and including all of the property at Florence to which you have testified in your examination in chief?

A. Yes sir.

101 Q. Will you produce that blue print to be offered in evidence to be marked exhibit J?

Objected to as immaterial.

102 Q. The property on the Blue Print offered in evidence and about which you testified in chief is all included in
301 that part which you have given a yellow color and a green color?

A. Yes, sir.

103 Q. discover that about one half of said property to the south thereof is colored green, I ask you whether any of the pumping stations or settling basins or buildings of the Water Works Company is located upon that part so colored green?

A. They are not sir.

104 Q. The Northern part of the property you have given a yellow color?

A. Yes, sir.

105 Q. Are the reservoirs, pumping stations, and buildings located upon that part so colored yellow?

A. Yes, sir.

106 Q. And on the river margin I see a part that is dotted with yellow spots, that is intended to represent what?

A. The rip-rapping on the river front.

107 Q. This blue print except in the part that you have given the part occupied by the water Company a yellow color and the part not occupied a green color? In other words in all other respects it conforms to the map which was introduced in evidence by the plaintiff upon the examination in chief?

A. Yes, sir.

Mr. Clarkson:

108 Q. I notice in the portion of the blue print that is colored green being lots six and seven in Block forty colored yellow what does the yellow color indicate?

A. That it has occupied a part of these two lots by a pump house.

302 109 Q. There are some portions of the yellow and green tracts that are colored red what do those red coloring- indicate?

A. Those were lands that were in litigation.

110 Q. I desire to call your attention to the description of the property in the deed from Eli S. Smoots to the American Water Works Company marked Exhibit E said deed describing 25 acres of land, are you familiar with the property in that deed?

A. No, I am not.

111 Q. Do you know where it is located?

A. Yes, sir.

112 Q. Do you know its location?

A. Yes, sir.

113 Q. Has any part of that 25 acres been used by the Water Company?

A. I do not know.

114 Q. Is there any part of that Water Plant located on that 25 acres of ground?

A. No, sir.

115 Q. There is not?

A. No, sir.

116 Q. Then it has never been used for the uses of the Water Company as a water plant?

A. No, sir.

117 Q. It has never had any pumping stations, reservoirs, [settlings] basins [of] water mains located there?

A. No, sir.

118 Q. Where does this property lay with reference to the Wall Nut Hill reservoirs?

A. Northwest.

119 Q. About how far from the Wall Nut Hill reservoirs?

303 A. About one mile and six tenths.

120 Q. How far is it west from the pumping station and settling basins, known as the old pumping station and settling basins, on the banks of the Missouri River?

A. About three miles.

121 Q. How far is it distant from the new pumping station and settling basins at Florence?

A. About five miles I would judge.

122 Q. How far is it distant from the nearest pipe line of the Water Company?

A. About one mile.

The further taking of testimony is adjourned until to-morrow morning at 10 o'clock.

Omaha, Neb., Nov. 10, 1894.

On this day the appointed time the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 12, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of further testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 13, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking [taking] of testimony is adjourned until to-morrow at 2 P. M.

304 Omaha, Neb. Nov. 14, 1894.

On this day this cause was adjourned until to-morrow at 2 P. M. the parties being unable to proceed at the appointed time.

Omaha, Neb. Nov. 15, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 16, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is postponed until to-morrow at 2 P. M.

106 Q. And on the river margin I see a part that is dotted with yellow spots, that is intended to represent what?

A. The rip-rapping on the river front.

107 Q. This blue print except in the part that you have given the part occupied by the water Company a yellow color and the part not occupied a green color? In other words in all other respects it conforms to the map which was introduced in evidence by the plaintiff upon the examination in chief?

A. Yes, sir.

Mr. Clarkson:

108 Q. I notice in the portion of the blue print that is colored green being lots six and seven in Block forty colored yellow what does the yellow color indicate?

A. That it has occupied a part of these two lots by a pump house.

302 109 Q. There are some portions of the yellow and green tracts that are colored red what do those red coloring- indicate?

A. Those were lands that were in litigation.

110 Q. I desire to call your attention to the description of the property in the deed from Eli S. Smoots to the American Water Works Company marked Exhibit E said deed describing 25 acres of land, are you familiar with the property in that deed?

A. No, I am not.

111 Q. Do you know where it is located?

A. Yes, sir.

112 Q. Do you know its location?

A. Yes, sir.

113 Q. Has any part of that 25 acres been used by the Water Company?

A. I do not know.

114 Q. Is there any part of that Water Plant located on that 25 acres of ground?

A. No, sir.

115 Q. There is not?

A. No, sir.

116 Q. Then it has never been used for the uses of the Water Company as a water plant?

A. No, sir.

117 Q. It has never had any pumping stations, reservoirs, [settlings] basins [of] water mains located there?

A. No, sir.

118 Q. Where does this property lay with reference to the Wall Nut Hill reservoirs?

A. Northwest.

119 Q. About how far from the Wall Nut Hill reservoirs?

303 A. About one mile and six tenths.

120 Q. How far is it west from the pumping station and settling basins, known as the old pumping station and settling basins, on the banks of the Missouri River?

A. About three miles.

121 Q. How far is it distant from the new pumping station and settling basins at Florence?

A. About five miles I would judge.

122 Q. How far is it distant from the nearest pipe line of the Water Company?

A. About one mile.

The further taking of testimony is adjourned until to-morrow morning at 10 o'clock.

Omaha, Neb., Nov. 10, 1894.

On this day the appointed time the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 12, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of further testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 13, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking [taking] of testimony is adjourned until to-morrow at 2 P. M.

304 Omaha, Neb. Nov. 14, 1894.

On this day this cause was adjourned until to-morrow at 2 P. M. the parties being unable to proceed at the appointed time.

Omaha, Neb. Nov. 15, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 16, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is postponed until to-morrow at 2 P. M.

Omaha, Neb. Nov. 17, 1894.

On this day at the appointed time the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 19, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 20, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

305 Omaha, Neb. Nov. 21, 1894.

On this day at the appointed time the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 22, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 23, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 24, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the further taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 26, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 27, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the further taking of testimony is adjourned until to-morrow at [at] 2 P. M.

306 Omaha, Neb. Nov. 28, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 29, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Nov. 30, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 1, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 3, 1894.

On this day at the time appointed the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 4, 1894.

On this day at the time appointed the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

307 Omaha, Neb. Dec. 5, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 6, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 7, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. Dec. 8, 1894.

On this day at the time appointed the parties hereto being unable to proceed, the taking of testimony is adjourned until to-morrow at 2 P. M.

Omaha, Neb. [Nov.] 10, 1894.

On this day at the appointed time, the parties hereto being unable to proceed, the taking of testimony hereto is adjourned until to-morrow at 2 P. M.

308 Omaha, Neb. [Nov.] 11, 1894.

The taking of testimony resumed pursuant to adjournment, the same parties appearing on either side testimony was taken as follows:

The plaintiff offers in evidence a certified copy of or-
132 dinance No. 29, of the City of South Omaha, being an ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha. A copy of same is hereto attached marked Exhibit 2.

The plaintiff offers in evidence a certified copy of an ordinance of the City of Florence, Douglas County, Neb., passed
133 Aug. 13, 1889, being an ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes. The same is hereto attached marked Exhibit 3.

The plaintiff offers in evidence the acceptance by the City of Omaha of assignment of the City Water Works Company of the City of Omaha, and all of its liabilities to the American
134 Water Works Company of Chicago. The same is hereto attached marked Exhibit 4.

The plaintiff offers in evidence a certified copy of Ordinance No. 445 of the City of Omaha, being an ordinance permitting
135 S. E. Locke or his assigns, contractors with the City of Omaha for the erection and maintenance of Water Works to locate the reservoir of said Water Works upon the Reservoir addition to the City of Omaha instead of near Hanscom Park. The same is hereto attached marked exhibit 5.

309 The defendant The American Water Works Co. offers
136 in evidence a certificate from the Secretary of State of Nebraska, showing that neither the American Water Works of Illinois or the American Water Works Company of New Jersey have filed articles of incorporation in the [Secretary] of State's office. The same is hereto attached marked Exhibit 5.

Attached to said Depositions are four several Deeds running to the American Water Works Company of Illinois, marked Exhibits "B," "E," "F" and "G," which said Exhibits are omitted as per stipulation of parties on file herein.

Copy.

EXHIBIT "H."

This Indenture, Made and entered into this 24th day of April, A. D. 1891, by and between the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, party of the first part, and The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, party of the second part,

Witnesseth: That the said party of the first part for and in consideration of divers good and valuable considerations, to it in hand duly paid by said party of the second part, the receipt whereof from said second party by said first party is hereby confessed and acknowledged, hath granted, bargained, sold, released, remised, enfeoffed and conveyed, and by these presents doth grant, bargain, sell, release, remise, enfeoff and convey unto the said second party its successors and assigns,

310 all and singular the pipes, mains, valves, hydrants and other apparatus, now lying and being in the streets, alleys and public places of the Cities of Omaha, South Omaha and Florence, in the County of Douglas and State of Nebraska, or in any territory adjoining either of said cities or elsewhere; and all machinery, pumps, boilers and engines, and all pipes, valves, hydrants and other apparatus wheresoever situate, and all tools, material on hand, personal property and assets of said first party, wheresoever situate or being, excepting the tools and implements which the said first party may have in and about the City of Denver, Colorado, which it had been using or intending to use or is using in and about the construction of any water works in said City of Denver, Colorado.

And also, the real estate of the first party, wheresoever situate, and among which last [in] the following real estate, viz:

I.

Florence: Beginning at the intersection of the west bank of the Missouri River with the South line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the East line of Fifth (5th) Street in said City, thence south-

erly along the East line of said Fifth (5th) street to the right of way of the Chicago, St. Paul, Minneapolis and Omaha Railroad, thence southerly along the East line of said right of way to the South line of State street in said City; thence easterly along the South line of said State street to the East line of said railroad right of way, South of State Street; thence southerly along said right of way line to the North line of Washington Street in said City; thence Easterly along the North line of said Washington Street to the East line of Mill Street in said City; thence northerly along the East line of said Mill Street to the North-west corner of Block Two Hundred and Fifty-eight (258) in said City; thence easterly along the
311 North line of said block Two hundred and Fifty-eight (258) to its intersection with the West Bank of the Missouri River; thence northwesterly along the West bank of the Missouri River, in all its meanderings, to the place of beginning. Also, Blocks Nos. Two (2), One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) in the said City of Florence. Also those parts of Adams, Farnam and Sheffield Streets in said City as vacated, lying between the West line of Water Street and the East line of Mill Street in said City; Excepting from the above the following described pieces:—That part of State Street, and that part of the alley in Block Thirty-eight (38) lying West of the East line of the said Railroad right of way South of State Street extended northerly. Also, Lot Four (4) in Block Seventy-five (75), and Lot Five (5), in Block Twelve (12), in said City. Also, a right of way, as now travelled, Fifty (50) feet in width, across the Northwest corner of Block One Hundred and Twenty seven (127) also the undivided one-half (1-2) of Block Two Hundred and Fifty-six (256), in said City of Florence.

II.

Omaha: (A) The North fifty (50) feet of Lot Eighteen (18), and the West Ten (10) Feet of the North Fifty (50) feet of lot Seventeen (17), Block Two (2), Armstrong's Addition to the City of Omaha, as surveyed, platted and recorded.

(B) Block B in Reservoir Addition to the City of Omaha, as surveyed, platted and recorded.

(C) Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), and Eight (8) in Block Q. and Lots One (1), Two (2), Five (5), and Six (6), Block Three Hundred and Twenty-eight (328) in the City of Omaha according to the recorded plat thereof. Also, beginning at a point in the South line of Burt Street, at the Northeast corner of Block Three Hundred and

Sixty (360), in the City of Omaha, as surveyed, and
312 platted; thence North to a point corresponding with the South line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said City of Omaha; thence East to the Bank of the Missouri River at low water mark; thence [to] a South-easterly direction along the bank of the said Missouri River to a point corresponding with the South line of Burt street produced East from its present termination; Thence West to the place of beginning.

(D) Lots Seven (7), and Ten (10) in Block Seventeen (17), Kountze & Ruth's Addition to the City of Omaha, as surveyed, platted and recorded.

(E) The West Twenty-five (25) acres of the South one-half (1-2) of the North-east one-quarter (1-4) of Section Seven (7), Town Fifteen (15) North, Range Thirteen (13), East of the Sixth (6th) Principal Meridian.

To Have and to Hold the said premises and property and assets aforesaid unto the said party of the second part, its successors and assigns, in fee simple forever.

And the said party of the first part, for itself, its successors and assigns, doth covenant, grant, bargain and agree, to and with said second party, that it is well seized of all the above granted premises; that the same are free and clear of [incumberance], excepting a certain mortgage to secure an issue of four hundred thousand (400,000) dollars of six per cent. Bonds made and executed by The City Water Works Company of Omaha, the Grantor of the first party, to the Farmers' Loan & Trust Company of New York, as Trustee, which mortgage bears date the ..... day of ..... 188..; also a certain mortgage to secure four million (4,000,000) dollars of Bonds, made by said first party to said Trust Company above mentioned, bearing date July 1st, 1887, of which said four million dollars of Bonds, three million six hundred thousand have been issued and are outstanding, and four hundred thous-
and are [are] lodged in trust with said Trust Company
313 for the purpose of retiring the said four hundred thousand dollars of Bonds secured by the mortgage first hereinabove mentioned; subject to which said [incumberances] this conveyance is made.

And that the said premises in the quiet and peaceful enjoyment of the said party of the second part, its successors and assigns, against all lawful claims whatsoever, except said [incumberances], said first party will forever warrant and defend.

And in further consideration of the premises and for the further assurance of the said second party, said first party hereby covenants and agrees that it will in the future at any time, on request of the said second party, its successors and assigns, make such further and other conveyance of the property hereby conveyed, or intended so to be, as shall be necessary to convey to said second party all the title to any of said premises or property, or any part thereof, hereby conveyed, or in-ended so to be, which the said first party now has or is entitled to have.

In Witness Whereof, The said first party hath caused these presents to be executed by its President and Secretary, under its corporate seal, the day and year first above written.

THE AMERICAN WATER WORKS COMPANY,
By W. A. UNDERWOOD, President.
W. H. HALL, Secretary.

State of Colorado,
County of Arapahoe—ss.

On this 24th day of April, A. D. 1891, personally appeared before me, a Notary Public in and for said County in the State aforesaid, William A. Underwood, personally known to me to be the President of the First party to the foregoing instrument, and acknowledged that the same was executed
314 by the said first party, by him as its President, and William H. Hall, as its Secretary, in the name and by the authority of the said first party, as and for its free and voluntary act and deed; and that the same so executed by them, was the free and voluntary act and deed of the said first party.

In Witness Whereof, I have hereunto set my hand and affixed my [offlivial] seal, at Denver, Colorado, on the day and year first hereinabove written.

My commission expires June 28, 1893.

F. W. HERBERT,
Notary Public.

State of Colorado,
County of Arapahoe—ss.

On this 24th day of April, A. D. 1891, personally appeared before me, a Notary Public in and for said County in the State aforesaid, William H. Hall, personally known to me to be the Secretary of the first party to the foregoing instrument, and acknowledged that the same was executed by the said first party, by him as its Secretary, and William A. Underwood, as

its President, in the name and by the authority of the said first party, as and for its free and voluntary act and deed; and that the same, so executed by them, was the free and voluntary act and deed of the said first party.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at Denver, Colorado, on the day and year first hereinabove written.

My commission expires June 28, 1893.

F. W. HERBERT,
Notary Public.

315 State of Colorado,
County of Arapahoe—ss.

I, Joseph H. Smith, County Clerk within and for said County, in the State aforesaid, do hereby certify that F. W. Hurbert, by whom the foregoing acknowledgment was taken, was at the date thereof a Notary Public in and for the County of Arapahoe, duly coamissioned and qualified, and authorized by the laws of Colorado, to take the same; that I am well acquainted with his handwriting, and verily believe the signature to the said acknowledgment is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of said State.

In Testimony whereof, I have set my hand and affixed my official seal, at Denver, in said County, this 24th day of April, A. D. 1891.

JOSEPH H. SMITH,
County Clerk.

And the same was indorsed upon the back as follows, to-wit: —The American Water Works Company, of Illinois to the American Water Works Company, of New Jersey.

The State of Nebraska,
Douglas County—ss.

Entered on Numerical Index and filed for record in the Register of Deeds office of said County, the 7th day of Oct. 1891, at 8:40 o'clock A. M. and recorded in Book 157 of Deeds, page 193.

T. A. MEGEATH,
Register of Deeds.
By W. H. HOERNER, Deputy.
(Compared)

316 (Copy)

EX. "1."

This Indenture, Made and entered into this 24th day of April, A. D. 1891, by and between The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, of the first part, and the American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, of the second part.

Witnesseth: That the said first party, for and in consideration of divers good and valuable considerations, the receipt whereof, by said first party from said second party is hereby confessed and acknowledged, hath granted, bargained, sold, assigned, and conveyed, and by these presents doth grant, bargain, sell, assign and convey unto the said second party, its successors and assigns, all of the interest of the said first party in and to all and singular, the franchises, rights, easements and privileges which said first party now has or may be entitled to under and by virtue of any contract now existing between the City of Omaha, in the State of Nebraska, and said first party, and under and by virtue of any contract now existing [berween] the Cities of South Omaha and Florence, in the County of Douglas, in the State of Nebraska, and said first party, and under and by virtue of any contract with any municipality in said County of Douglas in the State of Nebraska made by any of said municipalities with either the said first party or the City Water Works Company, of Omaha, its grantor, or with one Sidney E. Locke or with any other person or persons, and which by assignment have passed to said first party, and under and by virtue of any ordinance or ordinances, resolution or resolutions of the municipal authorities of the said City of Omaha and the said Cities of South Omaha and Florence, and under and by virtue of any contract with the East Omaha Land Company, or any person or persons whomsoever, whereby any rights, privileges, easements or franchises have been granted to said first party or its grantors,
317 subject, however, to the performance by said second party of all the obligations and duties imposed by any of said contracts, franchises, resolutions or ordinances upon said first party, or upon the grantors of said first party, and subject to any limitations imposed upon said first party or its said grantors, or either of them, by any of said contracts, franchises, resolutions or ordinances, to the same extent and in the same manner as would be the case with the said first party if this instrument of assignment had never been executed.

And the party of the first part hereby gives and grants to said party of the second part full power and authority in its

name, or otherwise, but at the cost and expense of the said second party, to receive, receipt for, sue for and collect all sums of money which may become due on account of anything in any of said contracts, resolutions, or ordinances contained, after the first day of November, A. D. 1890, to the same extent and with the same force and effect as said first party could have received, receipted for, sued for or collected the same if this instrument had never been executed.

And the said first party, in further consideration of the premises and for the further assurance of said second party, its successors and assigns, hereby covenants, grants, bargains, and agrees to and with the said second party, its successors and assigns, that it will in the future, whenever requested by said second party, its successors and assigns, make, execute and deliver to said second party, its successor- and assigns, and such further and other assignments and conveyances of the rights, privileges, franchises and easements hereinbefore conveyed, or intended so to be, as to the said second party, its successors and assigns may seem proper and necessary.

In Witness Whereof, the said first party hath caused this instrument to be executed by its President and Secre-
318 tary under its Corporate Seal the day and year first above written.

THE AMERICAN WATER WORKS COMPANY,
By W. A. UNDERWOOD, President.
W. H. HALL, Secretary.

State of Colorado,
County of Arapahoe—ss.

On this 24th day of April, A. D. 1891, personally appeared before me, the subscriber, a Notary Public in and for said County, William A. Underwood and William H. Hall, each personally known to me to be [respectfully] the President and Secretary of the said first party to the above instrument, and each acknowledged that the said instrument had been executed for and in behalf of said first party, and by said first party, by them respectively as President and Secretary, and under its corporate seal, as and for its free and voluntary act and deed; and that the same so executed was the free act and deed of the said first party.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at the City of Denver, in said County, the day and year first above written.

My Commission expires June 28, 1893.

F. W. HERBERT,
Notary Public.

319 State of Colorado,
County of Arapahoe—ss.

I, Joseph H. Smith, County Clerk within and for said County, in the State aforesaid, do hereby certify that F. W. Herbert, by whom the foregoing acknowledgment was taken, and was at the date thereof, a Notary Public in and for the County of Arapahoe, duly commissioned and qualified, and authorized by the laws of Colorado, to take the same, that I am well acquainted with his handwriting, and verily believe the signature to the said acknowledgment is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of said State.

In Testimony Whereof, I have set my hand and affixed my official seal at Denver, in said County, this 24th day of April, A. D. 1891.

JOSEPH H. SMITH,
County Clerk.

And the same was indorsed on the back as follows, to-wit:—The American Water Works Company of Illinois to The American Water Works Company of New Jersey.

The State of Nebraska,
Douglas County—ss.

Filed for record in the Register of Deeds of said County, the 7th day of Oct. 8:40 o'clock A. M., and recorded in Book 10 of Miscel. page 433.

T. A. MEGEATH,
Register of Deeds.
By M. H. HOERNER, Deputy.
(Compared)

320 EX. "K."

Ordinance No. 29.

An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes, to the American Water [Corks] Company of Chicago, Illinois, for the term of seventeen years.

Be it Ordained by the Mayor and Council of the City of South Omaha, Douglas County, Nebraska.

Section 1. That the exclusive right is hereby granted to The American Water Works Company of Chicago, Illinois, for the term of seventeen years, to lay and operate a system of water works in the streets, alleys and public places in said

City, connected with the present system of the City of Omaha, for and in consideration of the right to have the uses of water on equal terms that may now exist or hereafter exist in the City of Omaha, as furnished by this Company for fire and domestic purposes.

This ordinance to take effect from and after its passage, approval and publication.

Approved October 17, 1887.

FRED N. SMITH,
Acting Mayor.

Attest.

E. K. WELLS,
City Clerk.

We, the Ordinance Committee recommend the passage of the within.

F. M. SMITH,
A. GARY,
D. RAFFERTY.

South Omaha, Neb. Nov. 8th, 1894.

I, Joseph J. Maly, City Clerk of the City of South Omaha, do hereby certify that the attached herewith and foregoing is a correct and true copy, of Ordinance No. 29, as it appears on record and now on file in the City Clerk's Office South Omaha, Nebr.

321 Witness my hand and Official Seal this 8th day of November, 1894.

JOSEPH J. MALY,
[Seal] City Clerk.

Indorsed as follows: Copy. Ordinance No. 29. Granting Right to Lay a System of Water Works in South Omaha.

EX. "L."

Copy of an Ordinance of the City of Florence, Passed Aug. 13, 1889.

To procure a supply of water for the City of Florence and its inhabitants, for fire and domestic purposes, and to contract with The American Water Works Company therefor.

Be it Ordained by the Mayor and Council of the City of Florence.

Section 1. The right, privilege and franchise to use the street lanes, alleys and public places of the City of Florence, for the purpose of laying down, maintaining, repairing and re-

newing water mains and pipes, hydrants and valves, is hereby granted to The American Water Works Company, its successors and assigns.

Section 2. The American Water Works Company shall, within three months after the passage of this Ordinance, lay down water pipe in the streets of said Florence, as follows, viz:

On State Street from Fourth Street to Prospect Street; and on Main Street from Monroe Street to Calhoun Street; and shall set thereon twelve (12) double fire hydrants at the following points and places, viz:

One at Northeast Corner State and Fourth Streets;
One at Northeast corner State and Main Streets;
One at Northwest corner State and Fifth Streets;
One at Northwest corner State and Bluff Streets;
322 One at Northeast corner State and Prospect Streets;
One at Southwest corner Madison and Main Streets.
One at Southwest corner Harrison and Main Streets;
One at Southwest corner Monroe and Main Streets;
One at Northwest corner Willet and Main Streets;
One at Northwest corner Jefferson and Main Streets;
One at Northwest corner Clay and Main Streets;
One at Northwest corner Calhoun and Main Streets.

And the Company shall hereafter extend its mains and set hydrants thereon whenever ordered so to do by the City Council of said City of Florence; provided, however, that no such extension shall be made unless a hydrant is ordered for each four hundred feet of extension.

Section 3. The City of Florence hereby rents of the said The American Water Works Company the right to use said twelve hydrants, and such other hydrants as it may from time to time order to be set, during the whole term of fourteen years from the first day of September, 1889, and will pay therefor, the sum of sixty dollars per annum for each alternate hydrant, from the respective days when such hydrants may be respectively set and ready for use, for the first five years ensuing September 1, 1889; and the sum of sixty dollars per annum for each of said hydrants for the remainder of said term of fourteen years, payable annually on the first day of July in each year at the office of the Company in the City of Florence.

Section 4. The said Company or its assigns shall, during the whole term of said Fourteen years, keep said mains, pipes and hydrants mentioned in Section Two hereof, and such additional mains, pipes, and hydrants as shall be ordered and

set under the terms hereof, at all times supplied with water from its main pipe or pipes leading to the City of Omaha from its pump house in Florence, and shall at all times keep and maintain such mains; pipes and hydrants in good order and repair, unavoidable accident excepted.

323 Section 5. Water shall be supplied during said term of fourteen years free of charge by the Company for drinking and washing purposes at each public school which shall be maintained in the City of Florence, and for public drinking fountains for man and beast, to be furnished and set by the Company, and connections made by the Company.

Section 6. The said Company and its assigns shall furnish water to citizens residing along the line of said mains, at the prices now fixed in the City of Omaha, under such rules as the Company now has governing connections with its mains and the use of water by private consumers in the City of Omaha. The Company shall be at liberty to inspect any service or service pipe at [at] any reasonable hour to stop waste of water, to reject any service pipe as unsuitable, and to regulate the use of water by all usual and customary regulations.

Section 7. Should the price of hydrant rental at any time during said terms be reduced in the City of Omaha, then the same reduction shall be made in Florence for the remainder of the unexpired term, on the City of Florence, complying with the same terms which may be the consideration for such reduction in Omaha.

Section 8. The City shall be responsible for any injury occasioned to any main, pipe or hydrant by any officer, agent or servant of the City. The City shall designate annually certain persons who shall be permitted to open and close fire hydrants, and then only in case of an alarm of fire. And the City shall, by ordinance, protect the property of the Company from injury by trespassers and its water supply from pollution to such extent as may be possible.

Section 9. The Company shall hold the City harmless of and free from any damage caused to person or property on account of any excavation by the Company in the Streets and public places of the City.

324 Section 10. Whenever the said Company shall at any time make any excavation in the streets of Florence for the purpose of laying or re-laying, repairing or renewing any pipe, valve, main or hydrant; the said Company shall restore the same to as good condition as the same was in previous to any such excavation. And upon any failure so to do,

for thirty days succeeding notification of that fact from the City Council of the said City, the said City may proceed to restore the said street at the expense of the Company.

Section 11. The City shall establish grades for all of its streets upon which it may by this Ordinance, or at any time hereafter, order the laying of any pipes by the said Company; and the said Company shall either lay its pipes so as to conform to the grade line so established, or whenever the street is actually graded, cause said pipe to be laid to conform to the grade line so established, without expense to the City; causing any excavation it shall make in doing such work to be restored, and the street to be put in as good order as if the said Company had originally laid its pipe to conform to grade. It is understood that all pipes laid in the City shall have a covering of at least four and one half feet of earth.

Section 12. Upon the acceptance of this Ordinance in writing signed by the President or Secretary of the Company under the seal of the Company, the same shall become a contract between the City and the Company.

Section 13. This Ordinance shall take effect and be in full force from and after its passage.

Mr. Christian,	Yea,
Mr. Walker,	Yea.
Mr. King,	Yea.
Mr. Brown,	Yea.

Passed August 13, 1889.

(Signed) H. HALL, Mayor.

J. WEBER, City Clerk.

325 I hereby certify that this is a correct copy of Ordinance passed August 13, 1889.

[Seal] (Signed) A. F. CLOSE, City Clerk.

Nov. 3, 1894.

Indorsed as follows: Copy of Ordinance of the City of Florence. Passed Aug. 13, 1889.

Copy.

EX. "M."

City of Omaha,
Council Chamber.
Omaha, Nebr., Jan. 10, 1888.

Mr. President:

Your Committee to whom was referred the assignment of the City Water Works Company of the City of Omaha and all

its liabilities to The American Water Works Company of Chicago, have carefully considered the same and recommend that the assignment be granted.

No. 72. Received Jan. 10, 1888.

J. B. SOUTHARD,
City Clerk.
M.

Approved Jan. 12, 1888.

W. J. BROATCH, Mayor.

Presented to Council Jan. 10, 1888.

Adopted.

J. B. SOUTHARD,
City Clerk.
M.

ADAM SNYDER,
M. LEE,
T. J. LOWRY.
Committee on Fire, Water Works.

Indorsed as follows: Acceptance by City Council of The American Water Works Co. of Chicago.

EX. "N."

Ordinance No. 445.

An ordinance permitting S. E. Locke or his assigns, contractors with the City of Omaha for the erection and maintenance of water works and supplying said City with
326 water for public use, to locate the reservoirs of said water Works upon Reservoir Addition to the City of Omaha, instead of near Hansom Park.

Be it Ordained by the City Council of the City of Omaha:

Section 1. That, Whereas, under the terms and conditions of Ordinance No. 423, passed June 11, 1880, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska," and of Ordinance No. 430, passed July 15, 1880, amendatory thereof, S. E. Locke, being the lowest and best bidder was awarded the contract for furnishing the City of Omaha with water for fire protection and public use, and did upon the 20th day of July A. D. 1880, enter into contract with said City of Omaha to furnish to it such water supply and did accept the terms and conditions of said ordinances Nos. 423 and 430, and did enter into Bond with the said City for the faithful performance of said contract, and,

Whereas, it was provided by the report of J. D. Cook, Engineer, filed May 25, 1880, and the appendix thereto, filed May

31, 1880, which were duly made a part of said ordinances and were accepted as the plan of said water works by the said S. E. Locke, that the site of the reservoirs should be near "Hanscom Park;" and,

Whereas, On the 6th day of October, A. D. 1880, the said S. E. Locke, or his assigns, filed with the City Clerk of the City of Omaha the report of J. D. Cook, Consulting Engineer, Dated September 20, 1880, recommending that the site of such reservoirs be changed from Hanscom Park to a tract of land adjoining the western limits of the City of Omaha, bounded north and south by Hamilton and Cuming Streets and west by the County Road, near the North and South centre line of Section 17, Township 15, Range 13, East of the 6th Principal Meridian, which said tract of land has since been platted by its proprietors Samuel R. Johnson, and Nathan Shelton,
327 as an addition to the City of Omaha and is now a part of said City known as Reservoir Addition to the City of Omaha; and,

Whereas, The said S. E. Locke, or his assigns, have made petition and request to the City Council of the City of Omaha to change the location of said reservoirs from said Hanscom Park to said last described lands; and,

Whereas, The recommendation of said J. D. Cook, consulting engineer, is concurred in by Henry Rohwer, City Engineer of Omaha,

Therefore, The said S. E. Locke, or his assigns, is hereby authorized and permitted to locate said reservoirs of the said water works upon said tract of land now a part of the City of Omaha, known as Reservoir Addition to the City of Omaha, as surveyed, platted and approved by the mayor and city Council and of record in the office of the County Clerk of Douglas County, Nebraska; provided, however, and this change of site of said reservoirs is permitted to be made upon the following conditions, viz: There shall be no change of hydrants and of the location thereof as provided in said Ordinances Nos. 423 and 430 and the accompanying plans, unless such change shall by the Council as provided for in said Ordinances; there shall be no extension of the time provided in Section 13 of Ordinance No. 423 from such change of site of reservoirs, and said water works shall be constructed and completed within one year of the 20th day of July, A. D. 1880; there shall be no lessening of the sizes fixed in said reports of J. D. Cook, Engineer, filed May 25th, 1880, and May 31st, 1880, and any new locations or changes in mains and pipes necessitated by the change of the site of the reservoirs shall be subject to the inspection, approval and allowance of the City Council of Omaha.

Section 2. The change of site of said reservoirs of said water works contemplated by the first section of this ordinance shall not be authorized or permitted until there shall be filed in the office of the City Clerk of the City [—]
328 Omaha, the written acceptance and consent to this ordinance of said S. E. Locke and his assigns, and also the written consent to this ordinance and the contemplated change of location of reservoirs of all of the sureties upon the bond of said S. E. Locke, filed July 20th, 1880, and the agreement of said sureties with the City of Omaha that nothing herein contained shall be considered as releasing the said sureties from their obligation upon said bond.

Section 3. This ordinance shall take effect and be in force from and after its passage.

Passed Nov. 9, A. D. 1880.

JAMES E. BOYD,
President City Council.

Attest.

J. F. McCARTNEY,
City Clerk.

Approved November 11, A. D. 1880.

C. S. CHASE, Mayor.

EX. "O."

United States of America,
State of Nebraska—ss.
Office of Secretary of State.

I, John C. Allen, Secretary of State of the State of Nebraska, do hereby certify that I have examined the records of this office, and find that neither the Articles of Incorporation of the American Water Works Company of Illinois, nor the Articles of Incorporation of The American Water Works Company of New Jersey have been filed for record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

329 Done at Lincoln, this 26th, day of November, in the year of our Lord, One Thousand Eight Hundred and Ninety-four of the Independence of the United States the One Hundred and Nineteenth and of this State the Twenty-eighth.

[Seal]

JOHN C. ALLEN,
Secretary of State.

C. C. CALDWELL, Deputy.

Attached to said Depositions are Maps marked Exhibits "A," "C," "D" & "J" which are omitted as per stipulation of parties on file herein.

Upon the back of said Testimony appear indorsements in the words and figures following, to-wit: No. 96 Q. Farmers Loan & Trust Company vs. American Water Works Co. et al. Testimony on behalf of plff. Filed May 7, 1895. Elmer D. Frank, Clerk.

Thereupon afterwards, at the May 1895 Term of said Court on the 7th day of May, 1895, the following proceedings were had and done in said case as appears of record on folio 684 Journal "T" of said Court, to-wit:

ORDER.

The Farmer's Loan & Trust Co., Complainant,

96 "Q." vs.

The American Water Works Co., et al., Defendants.

On this 7th day of May, 1895, the Court being sufficiently advised on the motion of E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey) and of the American Water Works Company (of New Jersey) by E. Hyde Rust, Receiver, to file the joint and several answer of the said Receiver and the said New Jersey Company, tendered
330 herein on November 17th, 1894, does now order and adjudge that the said motion be, and the same is overruled, to which the said Receiver and the said New Jersey Company by said Receiver object.

And thereupon the said E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey), and the said American Water Works Company (of New Jersey), by said Rust, Receiver, objected to the hearing or consideration by the Court of any of the proofs taken in this cause in behalf of the plaintiff, and move to strike out and suppress all of said proofs on the ground that none of said proofs were taken upon notice to said Receiver or his solicitor of record, and the Court being advised on said objection and motion, over-rules the same, and to which the said Receiver and said New Jersey Company, by said Receiver then and there excepted.

Thereupon afterwards, to-wit: on the 24th day of June, 1895, Answer of Clarkson, Receiver, and Motion for leave to file

same was filed in said case, which said Motion and Answer are in the words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

MOTION.

The Farmers' Loan & Trust Company, Complainant,
vs.
The American Water Works Company, et al., Defendants.

Now comes Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, and moves the Court for leave to file his answer herein instanter.

The answer that this defendant desires to file is herewith submitted to the Court and it is believed presents a meritorious defense as will therein more fully appear.

331 THADDEUS S. CLARKSON,
Receiver of American Water Works Company.
By JNO. L. WEBSTER, Solicitor.

In the Circuit Court of the United States for the District of Nebraska.

The Farmers' Loan & Trust Company, Complainant,
vs.
The American Water Works Company, et al., Defendants.

AMENDED AND SUPPLEMENTAL ANSWER OF THE AMERICAN WATER WORKS [COMPANT] (OF ILLINOIS), BY T. S. CLARKSON, ITS RECEIVER.

Now comes T. S. Clarkson, Receiver of the American Water Works Company (Of Illinois), one of the defendants herein, and by way of amended and supplemental answer to the answer of the American Water Works Company (of Illinois) heretofore filed herein to the Bill of Complaint of the Farmers' Loan & Trust Company, complainant; now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said Bill of Complaint contained, for answer thereto, or to so much or such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant for answer saith:

1. That on or about the first day of May, 1895, a certain action was begun in the Circuit Court of Cook County in the State of Illinois, wherein the Holly Manufacturing Company was complainant and the American Water Works Company

(of Illinois) and others were defendants, the object and prayer of said suit being to wind up the affairs of the American Water Works Company (of Illinois) as an insolvent corporation under and pursuant to a provision of the Statutes of Illinois in that regard, and for the appointment of a Receiver to take possession of all the property and assets of said
332 Company.

2. That afterward on the first day of May, 1895, an interlocutory decree was entered in said cause, in which it was ordered and adjudged by the Court that The American Water Works Company, which was incorporated under the laws of the State of Illinois has subjected itself to a forfeiture of its charter and corporate powers and that a Receiver of the Company should be appointed under the provisions of Section twenty-five of an Act of the Legislature of the State of Illinois, entitled "An Act Concerning Corporations" approved April 18th. 1872; and wherein it was further ordered, adjudged and decreed that Francis B. Peabody be appointed Receiver of all the property, real and personal, rights, franchises, credits, moneys, choses in action, bills receivable and all and any other property belonging to the American Water Works Company (of Illinois.)

Said decree further made provision for the said Receiver taking possession of the property, choses in action, moneys, books, papers, contracts and all other property of every nature, kind and description, belonging to said Company, wheresoever situated.

Said decree contained a further provision by which it was ordered, adjudged and decreed that all the officers, agents, attorneys, servants and employes of said Company be restrained from using its name for any purpose or in any proceedings.

3. This defendant further saith that afterward on the second day of May, 1895, The Holly Manufacturing Company filed its certain Bill of Complaint in the Circuit Court of the United States for the District of Nebraska, against the American Water Works Company (of Illinois), and against the American Water Works Company (of New Jersey), which said Bill of Complaint set forth the proceedings in the Circuit Court of the United States for Cook County, State of Illinois, in the said suit above mentioned, praying for a decree to wind up the affairs of the American Water Works Company (of Illinois) and to forfeit its franchises under and by virtue of the Statutes
333 of Illinois in that regard, and which said Bill of Complaint so filed in the Circuit Court of the United States for the District of Nebraska, had attached thereto, exempli-

fied copies of the pleadings and decree so entered in the Circuit Court of Cook County, State of Illinois.

And which said Bill of Complaint so filed in the Circuit Court of the United States for the District of Nebraska, prayed for the appointment of an ancillary Receiver. And in this connection this answering defendant refers to and asks to have considered as a part hereof the said Bill of Complaint in the suit of The Holly Manufacturing Company vs. The American Water Works Company, being the suit numbered 107, Docket R.

4. That in said last named suit there was entered a decree which is as follows, to-wit:

"The Bill of Complaint in this cause having been this day exhibited to the Court, and the Court being fully advised in the premises, and it appearing to the Court that Francis B. Peabody of Chicago, Illinois, has been under and by virtue of a statute of the State of Illinois, for the dissolution of corporations by decree, which said statute forms a part of the Charter of The American Water Works Company, a corporation organized under the laws of the State of Illinois, by the Circuit Court of the County of Cook, Illinois, duly appointed as Receiver of the said last mentioned corporation. The American Water Works Co. with full power to immediately take possession of all the property and assets of said mentioned corporation, wherever the same may be located, together with all moneys, choses in action, book accounts, books, papers, contracts and all property of every nature, kind and description belonging to, or in the possession of the said last mentioned corporation, wheresoever the same may be situated, and to any property the possession and title of which the said last mentioned corporation may hereafter become entitled to, and the full power to manage and control said property under the
334 orders of said Court, and with the usual powers of receivers in like cases, and with the power to sue in all Courts, and to do all things necessary to closing up the affairs of the said last mentioned corporation.

And it further appearing that the said last named corporation has or may have property, real or personal, assets, choses in action, together with rights to be sued for, or defended, and other assets within the State of Nebraska, and the District of Nebraska:

And it further appearing that the said Francis B. Peabody upon his appointment as such receiver by said Circuit Court of Cook County, Illinois, duly qualified and gave bond as such receiver in the penal sum of Ten Thousand Dollars:

And it appearing that Thaddeus S. Clarkson, of the City of Omaha, is a suitable and proper person to be appointed as a receiver ancillary to the said Francis B. Peabody to take possession of the property, real and personal, choses in action, effects and assets, rights to be sued for and defended, convert the same into money, and to remit the proceeds to the said Francis B. Peabody for distribution in the proceedings pending in Illinois:

It is therefore ordered that Thaddeus S. Clarkson of the City of Omaha, Nebraska, be, and he hereby is appointed as receiver ancillary to the said Francis B. Peabody to take possession of the property, real and personal, choses in action, effects and assets, sue for and collect the same, to defend all the actions against said The American Water Works Company of Illinois in the District of Nebraska, convert such assets into money, and upon the order of this Court to remit the proceeds to the said Francis B. Peabody, to be distributed in accordance with the decree of the Circuit Court of Cook County, Illinois.

It is further ordered, adjudged and decreed that nothing in this order shall be held to require the receivers of any of the property aforesaid, appointed by this Court in a foreclosure action begun by the Farmers' Loan & Trust Company,
335 as complainant, and against the defendants in this action and others, and now pending, to turn over to the receiver herein appointed any of said property, until the determination of that action; but upon such determination, if against the complainant therein, or upon the further order of the Court, the receiver herein shall receive, and all officers in control of the same shall deliver the moneys, property and assets of said corporation to the receiver hereby appointed, provided he shall give the proper bond in the sum of Twenty Thousand ($20,000) Dollars forthwith, and shall qualify as receiver herein.

It is further ordered that the amount of security required of said receiver shall be increased and fixed by the Court again in case the action by the Farmers' Loan & Trust Company is [dissmissed.]

(Signed) WALTER H. SANBORN,
Circuit Judge."

May 2, 1895.

And that the said T. S. Clarkson so appointed as said Receiver duly qualified as such receiver and assumed the duties and responsibilities set forth in said decree.

5. This defendant for further answer saith that in a suit lately pending in the Circuit Court of the United States for the District of Nebraska, wherein the United Water Works Com-

pany, limited, was complainant, and the American Water Works Company (of Illinois), and the American Water Works Company (of New Jersey), and others were defendants, by the consideration of this Court a decree was entered in which it was adjudged, decreed and determined that the property of the Water Works plant of the City of Omaha upon which it is sought by the Farmers' Loan & Trust Company, complainant herein, to foreclose the mortgages in its said Bill of Complaint set forth, was the property of The American Water Works Company (of Illinois) and the proceedings theretofore had, by which the American Water Works Company (of Illinois) had attempted to transfer the said property to The American Water Works Company (of New Jersey), were illegal and void and of no effect and that the attempted consolidation
336 of the American Water Works Company (of Illinois) into The American Water Works Company (of New Jersey), was illegal and void and of no effect, and which said decree further by its terms reinvested The American Water Works Company (of Illinois) with the full and complete legal title to all of the property so covered by the said mortgages sought to be foreclosed in this action, and that under and by virtue of the appointment of this defendant as Receiver of the property of The American Water Works Company (of Illinois) under said proceeding to wind up its corporate affairs and forfeit its franchises, it is the duty of this answering Receiver to make defence to said foreclosure proceeding, and to protect said property for the benefit of the general creditors and the stockholders of the said company. In support of this paragraph of this answer reference is made to the decree of this Court entered in the case of the United Water Works Company, limited, vs. The American Water Works Company and others, defendants, herein above more particularly referred to.

6. This defendant represents that prior to the 20th. day of May, 1880, the City of Omaha, a municipality of the State of Nebraska, desiring to construct, or cause to be constructed, a system of Water Works in the City of Omaha, employed one J. D. Cook to report to the City Council of the City of Omaha, a plan for the construction of a system of water works in the said City, and that said J. D. Cook, being a skilled hydraulic engineer, did report to the City Council of the City of Omaha, a plan for the construction of such a system of water works, said report being found printed and published by the City of Omaha in a book entitled "Charter and Ordinances of the City of Omaha" on pages 576 to 593, inclusive.

That said report was filed in the office of the City Clerk of the City of Omaha, on the 25th. day of May, 1880, and was afterwards approved by the City Council of the City of Omaha,

on the 18th. day of June, 1880, and is set forth at large in the said book, entitled "Charter and Ordinances of the City
337 of Omaha," at pages 576-593, inclusive.

That afterward on the 31st. day of May, 1880, the said J. D. Cook filed an appendix to his said report, which said appendix may be found on pages 594-595 of said book above referred to, and which said appendix was approved by the City Council, on the 8th. day of June, 1880.

7. This answering defendant further says, that afterwards, on the 11th. day of June, 1880, the City Council of the City of Omaha, passed an Ordinance which was on the same day approved by the Mayor of the said City, being Ordinance No. 423, entitled "An Ordinance to authorize, procure and construct a system of water works in the City of Omaha, Nebraska." In Section 1. of said ordinance it is provided that any person, company, corporation or association, who shall erect, construct and maintain water works of the magnitude and character therein described, and as more fully and at large appears in the said report and appendix of the said J. D. Cook, for the purpose of supplying the said City and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes, shall have the right of way along and upon and under the public streets of the said City for water mains, pipes and fire hydrants, during the time such person, company, corporation or association shall maintain and operate such system of water works, but upon the terms and conditions in the ordinance described.

Section 3. of said Ordinance sets forth the pumping capacity of such system of water works, and also the capacity of the water reservoirs to be constructed in connection therewith.

Section 4. of said Ordinance provides the size, length and capacity of the water mains, subject to approval and inspection by the City of Omaha.

Section 6. of said Ordinance provides for the location and placing of fire hydrants upon and along the streets of said City for the purposes of fire protection, subject to such changes and modifications as the City Council of said City shall direct as to location.

338 Section 7. of the Ordinance provides for the furnishing of a supply of water adequate to the wants and use of the public and for certain sanitary purposes therein set forth.

Section 10. of said Ordinances fixes a maximum charge to be made for the consumption of water for the varions purposes and uses therein set forth.

"Sec. 11. In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident) all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in Section 14. of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

Section 12. Provides for the receiving of proposals for the construction of said water works.

Section 13. Provides when the water plant shall be completed.

"Sec. 14. "The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an [apprainsed] valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, and these two to select the third: Provided, that nothing shall be paid for the unexpired franchise of said Company."

In Section 3. of said Ordinance No. 430, it is provided that the City Clerk of the City of Omaha should advertise
339 for sealed proposals for furnishing the City of Omaha with water for fire protection, and for public use for the term of twenty-five (25) years, according to the provisions of said Ordinance, and further provides that the bids received shall specify the price per hydrant per year to be paid therefor by the City of Omaha, as in said Ordinance and in said report of J. D. Cook provided, and that said bids should also be accompanied by an acceptance of the provisions of said ordinances in the event that the contract for the supply of water for the public and fire protection should be awarded.

8. In compliance with said advertisement for sealed proposals, one Sidney E. Locke made a bid for the construction of a system of water works, which was in terms as follows:

"PROPOSAL FOR THE CONSTRUCTION AND MAINTENANCE OF WATER WORKS, IN THE CITY OF OMAHA, STATE OF NEBRASKA.

"To the Honorable, the City Council of the City of Omaha:

"The undersigned hereby proposes to erect, construct and maintain water works in the City of Omaha for furnishing the City of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five (25) years from the time of the completion of said works, as fixed by an Ordinance No. 423, passed and adopted by your Honorable body, June 11th. 1880, and another Ordinance amendatory thereof, No. 430, passed and adopted, July 14th. 1880, and as required by the details and specifications in said Ordinance set forth and referred to.

The undersigned further, and in addition to the foregoing, and in further compliance with the requirements and specifications in said Ordinance set forth or referred to, propose to so erect or construct said water works as to furnish water through not less than two hundred and fifty hydrants as specified, and to so furnish said water so as above stated at a rate of eighty-four (84) dollars per year per hydrant, and further propose to erect and furnish water through such intermediate hydrants, in addition to the number first above
340 given, as may by the provisions of said Ordinance and in accordance with the report of J. D. Cook therein referred to, be further called for or required, at a rate of $10.00 per year per hydrant.

The undersigned further proposes, in case hydrants in addition to the number and quantity hereinbefore specified, shall, during the time provided for the maintenance of said water works, be required on new mains, to erect construct, maintain and furnish water through the same at the time or times and in the manner by said ordinance or the report of said J. D. Cook provided, at a rate of sixty dollars ($60.00) per year per hydrant.

The undersigned further proposes and states that the water so by the proposed works to be furnished shall be for the uses, of the kind and quantity, and at rates not to exceed those by said Ordinance fixed, determined or referred to, except as specified herein in connection with hydrant use.

This proposal is hereby accompanied by a bond duly executed in the sum of twenty-five thousand ($25,000.00) dollars as required.

The conditions and specifications of said Ordinance are hereby accepted in case award of contract for said works is made to the person submitting this proposal."

S. E. LOCKE.

Dated, Omaha, Neb., July 20th, 1880.

Which said proposal was accepted by the City of Omaha, and afterwards on the 20th. day of July, 1880, a written contract was entered into between the said Sidney E. Locke and the City of Omaha, for the construction of a system of water works, which said contract made reference to the said report of J. D. Cook, and to said Ordinances Nos. 423 and 430, and to the advertisement for sealed bids, which was made by the City Clerk pursuant to said Ordinances, which said contract was in [in] words and figures following:

341 "WATER WORKS CONTRACT.

"This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th. day of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, Witnesseth:

"Whereas, the City of Omaha did on the 11th. day of June, A. D. 1880, pass its certain Ordinance No. 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska," and did on the 14th. day of July, A. D. 1880, pass its certain Ordinance, No. 430, entitled "An Ordinance to amend Sections three (3), six (6) and twelve (12) of Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintenance of Water Works, in the City of Omaha, State of Nebraska, and

"Whereas, the City Council of said City of Omaha did receive from J. D. Cook, engineer, on the 25th. day of May, A. D. 1880, the report, and on the 31st. day of May, 1880, the appendix to said report referred to in Section one (1) of said Ordinance No. 423; and did on the 8th. day of June, 1880, adopt and approve said report and appendix; and

"Whereas, the said City of Omaha did in compliance with the provisions of the said Ordinance, advertise from the 16th. day of July, 1880, to the 20th. day of July, 1880, for sealed proposals for furnishing the City of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of the work, through

two hundred and fifty fire hydrants, of the character and location mentioned in the Ordinances Nos. 423 and 430, and said report of said J. D. Cook, engineer, as approved; and

"Whereas, the said City Council of the City of [Omaha], did on the 20th. day of July, A. D. 1880, accept said proposal of Sidney E. Locke, and did award said contract to him, and did order that the said contract should be formally made by the Mayor of the City of Omaha, acting in its behalf.

"Therefore, it is hereby contracted and agreed by and between said parties, as follows:

342 "In [complaiance] with said Ordinances Nos. 423 and 430, the said report of the said J. D. Cook, engineer, and the appendix thereto as approved by the said City Council, said advertisement, proposal and accepting thereof, and awarding of said contract (all of which are herein recited, as being understood to be parts of this contract) the said Sidney E. Locke party of the second part, contracts and agrees with said party of the first part to erect, construct and maintain said water works in the City of Omaha, and to furnish the City of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works, as fixed by said Ordinances Nos. 423 and 430, and by said report of said J. D. Cook, as approved by eighty-four dollars ($84) per year per hydrant, and to furnish agrees to furnish said water through not less than two hundred and fifty hydrants of the character and as located and placed in said ordinances and approved report, at the rate of eighty-four dollars ($84) per year per hydrant, and to furnish said water through such intermediate hydrants in addition to the number first given as may by the provisions of said ordinances and in accordance with said approved report be further called for or acquired, at the rate of ten ($10.00) per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified shall, during the term of said twenty-five years, be required on new mains, erect, construct and maintain said new mains at the rate of sixty dollars ($60.00) per year per hydrant.

"And in consideration of the said agreement of the said Sidney E. Locke, the said party of the first part agrees to pay for said hydrant water supply at the rates per hydrant per year above specified. The said payment to be made by warrants drawn upon the first day of July and the first day of January of each year and every year of said term upon the treasury of said City; the payment for the water from each hydrant to commence when it is actually ready for use and the City Clerk

notified thereof, and the pay thereof shall cease during
343 any time that the said hydrant shall be out of repair or unfit for use.

This contract shall take force and effect only upon its approval by the City Council of the City of Omaha.

In testimony whereof we have hereunto set our hands at Omaha, Nebraska, the date first above written."

(Signed) THE CITY OF OMAHA,
By C. S. CHASE, Mayor.
SIDNEY E. LOCKE.

Signed in Presence of

CHAS. F. MANDERSON,
C. J. WESTERDAHL.

Approved by the City Council, July 20, 1880.

(Signed) JAMES E. BOYD,
Pres't City Council.

Attest: J. F. McCARTNEY, City Clerk.

[Seal City of Omaha.]

That afterwards on the 26th. day of July, 1880, the said Sidney E. Locke for a good and valuable consideration, did sell, assign, transfer and set over unto "The City Water Works Company of Omaha, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, said contract for the construction, operation, control and maintenance of water works in the City of Omaha, with all the rights, privileges, immunities, profits, duties and obligations that he, said Sidney E. Locke did have thereunder, to the same extent in each and every part as if said contract had been made with the City Water Works Company of Omaha originally, and not with said Sidney E. Locke."

9. That afterwards the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the laws of the [the] State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, pretended to purchase of and from the said City Water Works Company of Omaha the said Water Works plant in the City of Omaha, including the real estate [connected] with the operation of the same, by means of which the City of
344 Omaha and its inhabitants were and are supplied with water for fire and other purposes, and thereby pretended to assume, and must be held to assume, and to be bound by all the terms and conditions of said contract be-

tween the said City of Omaha and the said Sidney E. Locke, and to maintain and operate said system of water works for the use and benefit of the City of Omaha in the same manner and to the same extent as the said Sidney E. Lock by his said contract was [bounded] to do.

That it was well known and understood between all the parties thereto that the chief object of the City of Omaha in taking the respective steps aforesaid looking toward the construction of said system of water works, was to supply the City of Omaha with water for fire protection and for public and domestic use in the same manner and to a like extent as if the said City of Omaha had in its own right and at its own expense constructed and owned said system of water works, and all of which facts the complainant company and all and singular of the owners and holders of the series of bonds in the Bill of Complaint set forth were bounden to know and had notice.

10. That the defendant, The American Water Works Company of Illinois, was not by law duly authorized on or about the first day of July, 1887, or at any other time to make and execute the mortgage in the Bill of Complaint described upon the said system of water works and was not by law duly authorized to secure the said issue or series of bonds in the Bill of Complaint described by any mortgage or deed of trust upon the said system of water works in the City of Omaha.

That the American Water Works Company of Illinois, the mortgagor Company herein, was not under and by virtue of its articles of incorporation authorized or empowered to make or execute said mortgage upon the said water plant, nor was said Company authorized thereunto, under and by virtue of the laws of the State of Illinois, nor under nor by virtue of the laws of the State of Nebraska, where said property is
345 situate, to make and execute said mortgage upon said property, and all of which facts the complainant company, as well as all and singular of the owners and holders of said bonds must be held [bounded] at all times to have known.

That said franchise, privilege and easement granted by the City of Omaha to the said Sidney E. Locke was a personal privilege granted by the City of Omaha to the said Sidney E. Locke, to be used only for the use and benefit of the City of Omaha and subject to its control, and so the defendant companies must be held to have accepted the same, and that no privilege or right of authority was ever granted, or intended to be granted by the City of Omaha to the said Sidney E. Locke or his assigns to mortgage, encumber or otherwise dispose of said franchise or any of the property constituting a part of

said system of water works or incidental or necessary thereto, or pertaining to the maintenance and operation of said system of water works or to do any other or manner of thing that would tend to take away or deprive them of their power to maintain and operate said system of water works for the use and benefit of the City of Omaha, as under said ordinances and said contract with Sidney E. Locke was and is provided for.

This defendant further answering says that all the property, real and personal, as well also the privileges, franchises and easements intended to be conveyed by said mortgage, were and are necessary to the use and enjoyment of the person or company operating said water plant, and were and are necessary to such Company to enable it to maintain said system of water works and to supply the said City of Omaha with water for domestic uses and for fire protection, all of which matters and things were all known to the complainant company at the time of the execution of the said pretended mortgage, and were also known to the persons becoming the owners and holders of the bonds pretended to be secured thereby.

That it was well known to the complainant Company, as well as to the said bondholders who purchased the bonds
346 pretended to be secured by said mortgage, that to enforce said mortgage by decree of foreclosure and sale of said property, or by the taking possession of said property by the said Trustee under and by virtue of said mortgage would deprive the defendant companies of the power to maintain and operate said water plant, and would render said defendant companies powerless to fulfill the obligations they assumed to the City of Omaha, and would thereby destroy and take from the City of Omaha the right which it had secured to itself by said contract with Sidney E. Locke to have its inhabitants supplied with water for domestic use, and the municipality to be supplied with water for fire protection and other purposes. Whereby, and by reason whereof said companies were without authority of law to make said mortgages, and the same were and are illegal and void.

These defendants further answering say that by Section 11. of said Ordinance 423, which is made a part of said contract with the water company, it is provided:

"In case of the refusal or neglect of any person, company or corporation or their assigns, who shall construct water works under this ordinance, to comply with the provisions and requirements herein contained and each thereof, and to keep such water works in good order and repair and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed

for repairs in case of accident) all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto or connected therewith, subject to the payment of just compensation therefor, to be ascertained as provided in Section 14. of this ordinance; provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

347 That under and by virtue of the provisions of said section the City of Omaha had and has a material interest in said property of which it could not and [connot] be divested by either a mortgage or sale under foreclosure, and further that the making of said trust deed was in violation of the provisions of said section, and that a foreclosure of said mortgage and sale of the water plant would deprive the defendant company of the power of complying with its duties and obligations to the City of Omaha, which would result in the forfeiture of said property and all the rights, privileges and immunities granted to the defendant companies, and reinvest the ownership, possession, control and management of said system of water works in the City of Omaha, and by reason whereof said mortgages were and are illegal and void, and were and are against public policy.

11. This defendant further answering says that while the said pretended mortgage purports and pretends to cover all the property and assets of every kind and nature of the mortgagor company, and also its privileges, franchises, easements and choses in action, no such extensive authority was ever undertaken or pretended to be granted by the said mortgagor company, and its officers who assumed to execute the said mortgage, and that the said J. R. Custer, assuming to act as President of the said mortgagor company, in the execution of said mortgage, acted without authority from said company in the making and executing of said mortgage in this, that they were never authorized to execute this particular instrument; and that all the authority possessed by the said Custer as President and the said Griffin as Secretary was such power and authority as were vested in them as such officers under the articles of incorporation and the by-laws of the mortgagor company, and by the Minutes of the proceedings of its Board of Directory, and that nowhere in their said articles of incorporation or by-laws or Minutes of proceedings of its Board of Directory was there authority granted to the said persons to execute the instrument in the Bill of Complaint set out.

348 Defendant further says that each and singular of the averments hereinbefore set forth touching the infirmities existing in said mortgage equally apply in truth and in fact to the said supplemental mortgage in the Bill of Complaint described, and that no bonds have been issued or sold for value under either of said mortgages.

12. That the defendant, the American Water Works Company (of Illinois) is a corporation created and organized under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, nor in any manner and form as provided by the laws of the State of Nebraska, authorized to do business in the State of Nebraska.

The said defendant, the American Water Works Company (of Illinois) was not by law authorized on the first day of July, 1887, or in January, 1889, or at any other time, to make or execute the mortgages or either of them, in said Bill of Complaint described, upon said system of water works, and was not by law authorized to secure the said alleged issue or series of bonds in said Bill of Complaint described, upon said system of water works, by any mortgage or deed of trust upon said system of water works in the City of Omaha; that said Company was not under and by virtue of its articles of incorporation authorized and empowered to make and execute said mortgage upon said plant or any part thereof, nor was said company authorized thereunder or by virtue of the laws of the State of Illinois, nor under and by virtue of the laws of the State of Nebraska, where said property was situated, to execute or make said mortgage upon said property, and said mortgage was an effort to create an indebtedness far in excess of the limit authorized by law, that is, in excess of two-thirds of the capital stock of said mortgagor Company; that said mortgagor Company's capital stock was and is only $600,000.00 and it had no power or authority to create or incur a liability in excess of $400,000.00, and the stockholders of said alleged mortgagor Company never authorized said mortgage to be given on all of the property described therein, and particularly did
349 said stockholders not authorize the mortgage of said contract and franchise from the City of Omaha.

And they say that said Illinois Company could not in any event have made a mortgage upon said property, especially the said contract with the City of Omaha, except upon the conditions and terms prescribed by said City of Omaha, which never agreed thereto, and except upon the further condition and terms that the said The American Water Works Com-

pany (of Illinois) and the said complainant herein should maintain and operate the said water works plant and provide for the same and all thereof being kept a going concern for the entire time of the said contract with the said City of Omaha, and except upon the provision and condition that the said Water Works Company and the said complainant and the several holders of the bonds issued under said alleged mortgage, should agree and provide for the furnishing of the necessary machinery, material-pipe, engines, hydrants and other necessary apparatus, to enable said water works plant to be maintained and operated, and to keep and hold good its said franchises and contract with the City of Omaha, that said Illinois Company had no right, power or authority to make any mortgage whatever on the property in Nebraska, if such mortgage exceeded two-thirds of the capital stock of said Illinois Company, and that said capital stock was and is only $600,000.00 and no more; that said franchises and privileges granted to said Sidney E. Locke by the City of Omaha, was a personal privilege granted to the said Sidney E. Locke for the use and benefit of the City of Omaha and its inhabitants, and subject to its control, and so under such terms and conditions, and subject to such charges, the said complainant accepted the said mortgages on said plant, and the said City of Omaha never did, at any time, agree to the making of said mortgages or the encumbering of said property or franchises, or to the assignment of said franchises of all which facts the bondholders and Trustee had notice.

13. This defendant further answering saith that the defendant, The American Water Works Company (of Illinois) was a pretended corporation pretended to be incorporated under the laws of the State of Illinois, for the purpose of enabling the persons connected therewith to do and transact business in the State of Nebraska, alone; and which said pretended corporation did not then and there intend to transact any business in the State of Illinois, and never has transacted any business in the State of Illinois; and never has owned any property in the State of Illinois; and that none of its pretended stockholders were citizens or residents of the State of Illinois, but the sole purpose of the said pretended organization under the laws of the State of Illinois was to enable the owners of the water plant in the City of Omaha, State of Nebraska, to exercise the powers and enjoy the privileges which could not be exercised or enjoyed under the laws of the State of Illinois; and was formed for the further purpose of evading the laws of the State of Nebraska; all of which matters and things in this paragraph stated were known to the Trustee under the mortgage, and the respective bondholders, if any there be, had notice.

14. This defendant further answering denies that default was made by the mortgagor Company in the payment of the coupons, as set forth in paragraph twenty (20) of the Bill of complaint, and in that connection further says that the coupons maturing January 1st. 1892, amounted to the sum of $98,000.00, and of which sum only $41,279.00 are outstanding, and of this sum $8,000 are owned and held by the Omaha National Bank, and were purchased and are held by the Omaha National Bank for the purpose of avoiding a forfeiture under the said mortgage, and that of said coupons $18,275 are owned by the United Water Works Company, and are held for the purpose of avoiding a forfeiture under said mortgage, thus leaving but a sum of $15,000 of unpaid coupons maturing January 1st. 1892.

Of the $98,000 of coupons maturing July 1st. 1892, there are only $48,000 outstanding, and of which amount $45,000 are held and owned by persons not desiring a default or a foreclosure under said mortgage.

Of the coupons maturing January 1st, 1893, only $22,500 are outstanding, and of which sum $21,290, or nearly the whole amount, are controlled by C. H. Venner, and who is
351 likewise opposed to the said foreclosure.

Of the coupons maturing July 1st. 1893, $32,000 have been purchased and are now controlled by persons who have waived default and are opposed to foreclosure.

That the whole amount of outstanding unpaid coupons is $209,775 prior to January 1st. 1894, and that the greater portion of which are held by persons who are opposed to foreclosure of said mortgage, and have not desired any default to be declared thereon, and that the whole amount of over due coupons controlled by the Farmers' Loan & Trust Company, complainant, is less than one-half of all the overdue coupons outstanding.

In this connection this defendant further answering says that the complainant company, as trustee, has never made any demand upon the [morttagor] company for the payment of any interest coupons, and that no demand has been made upon said trustee company by the holders of a majority of said coupons to declare a forfeiture or to foreclose said mortgage.

In this connection this defendant further answering says that the water plant at Omaha has at all times been earning sufficient money to pay its operating expenses and accruing interest and would have paid all said coupons upon maturity thereof, if it had been permitted to manage its said property, and in this [conncetion] further says that there is sufficient

money in the hands of this court belonging to the defendant companies to pay and take up all the coupons maturing before the first of January, 1894, which are in the hands or under the control of the complainant company, and sufficient to pay and take up the coupons held by persons now insisting upon foreclosure.

This defendant for further answer says that the defendant, The American Water Works Company of New Jersey, was and is a pretended corporation, pretended to be incorporated under the laws of the State of New Jersey, and that the sole and only purpose of the said incorporation under the
352 laws of the State of New Jersey, was to allow the owners of the water plant at Omaha, Nebraska, to exercise still greater powers and privileges than they could enjoy or exercise under the Articles of Incorporation of the Illinois Company, and more particularly to allow said persons to consolidate or amalgamate the property of the Omaha Water Works Company, at Omaha, with certain other water works property located at Denver in the State of Colorado, and which in the opinions of the persons who formed such corporation under the laws of the State of New Jersey, could not be accomplished under the Articles of Incorporation of the said Water Works Company, at Omaha, nor under the Articles of Incorporation of the American Water Works Company of Illinois; and that at the time of the said pretended incorporation under the laws of the State of New Jersey, none of the promoters of said scheme and none of the owners of the said respective water plants resided in the State of New Jersey.

And that the said pretended American Water Works Company of New Jersey failed to comply with the laws of the State of New Jersey in that its stock was not subscribed for at the times required under the laws of the State of New Jersey; and such stock as was subscribed for was not paid for as required by the laws of the State of New Jersey.

15. This defendant further answering says that the defendant company, The American Water Works Company of New Jersey, having dissensions in its Board of Directory, certain person- being desirous of obtaining control of the property, caused to be instituted certain legal proceedings in this Court and also in the Court of Chancery of the State of New Jersey, for the purpose of preventing the application of the earnings of the water company to the payment of said coupons, with the ultimate aim of bringing about a default in the payment of such coupons so that a foreclosure might be brought about, and by means of such foreclosure to enable certain of the stockhold-

ers, and certain of the holders of the bonds to obtain the title to and possession of the water plant to the exclusion of a large number of other stockholders and bondholders equally
353 interested in the preservation of the water plant, and equally interested in the prevention of foreclosure.

16. This defendant further says that as a part of said scheme to bring about the present attempted foreclosure, a committee was organized by certain dissatisfied stockholders and bondholders to obtain the control of certain of the bonds and coupons with a view to this foreclosure proceeding. That said committee was and is composed of seven persons, of whom Roswell G. Rolston, the President of the complainant company, is one. The said committee devised and issued and caused to be circulated among the bondholders certain circulars requesting them to surrender their bonds and coupons to said committee and requiring the owners and holders of said bonds and coupons to submit to an assessment of a considerable sum of money to be paid into the hands of said committee, under the pretense or claim of raising a fund to pay the expenses of protecting the interests of said bondholders, and which said circulars contained a further innendo or threat to the effect that if said bondholders submitted not their bonds and coupons to said committee or to the complainant company that they would forfeit their rights under the said mortgage, and that under and by virtue of said proceedings, innendoes and threats the complainant company was enabled to obtain possession or control of certain of said bonds and certain of said unpaid coupons to the limited amount hereinbefore set forth, and that the complainant company when called upon by certain of the stockholders and bondholders to disclose what persons, if any, being bondholders, had requested of the complainant company to declare a default and to bring a foreclosure proceeding, declined to make such disclosure or what persons if any, had so requested said default or said foreclosure. Wherefore, defendant charges upon information and belief that the declaration of default, if any, has been made by the complainant company, and said determination of said complainant company to file its bill of foreclosure has not been done in the interests of the bondholders, but has been in the interest and at the solicitation of
354 the said committee above referred to, and which was organized as this defendant is informed and believes to secure a personal advantage to themselves or those represented by them under their [procuremwnt] as aforesaid, and to the disadvantage and against the wish of a majority of the holders of the bonds and coupons. Wherefore, this defendant charges that this foreclosure proceeding is unjust and inequit-

able, and is contrary to, and unwarranted by the provisions and stipulations in the said mortgage in that behalf.

17. This defendant further answering denies E. Hyde Rust is in possession of any of the property or franchises covered by the said mortgage, but upon the contrary avers that under and by virtue of an order issued out of this Court, said E. Hyde Rust has been removed as receiver of said property, and that said E. Hyde Rust has not been exercising as such receiver any control over said property for a long time prior to the filing of the Bill of Complaint herein, and that this answering defendant was, by an order issued out of this Court, appointed receiver of all the property covered by said mortgages, and that he duly qualified and entered upon his duties as such receiver and has not been removed or discharged from his said trust.

And this defendant denies that the said E. Hyde Rust has any right to the possession or control of any part of the property covered by said mortgage under and by virtue of any order whatsoever issuing out of said Court of Chancery in the State of New Jersey, or under and by virtue of any order issued out of this Court, in the suit of the Denver City Water Works Company, et al. vs. The American Water Works Company, et al. referred to in any of the several divisions of paragraph 20. of the Bill of Complaint.

18. This defendant further answering says that if he had been permitted, or was now permitted, without the interference of the complainant company and of said committee, in the interest of whom the complainant company is acting, to receive, use and apply the moneys now on hand, and the revenues and receipts from said water plant to the payment
355 and discharge of the maturing coupons, this defendant could at all times and could now pay, discharge and take up all outstanding coupons and preserve, maintain and operate said water plant for the use and benefit of the City of Omaha, as in said contract between the City of Omaha, and Sidney E. Locke is provided, and further says that such a preservation of the said water plant by the defendant companies would best subserve the interests of all concerned. Wherefore, defendant charges and avers that such orders and decrees in that behalf should be entered herein in case the bonds are held to be valid obligations, as would provide for the taking up and discharge of said coupons, and as should preserve the said water plant to the defendant companies, and in that behalf that the prayer for the foreclosure of the said mortgage should be denied.

19. And this defendant further answering denies that the said complainant is entitled to the relief or any part thereof

in the said complaint demanded. And this defendant [prayes] the same advantage of this his answer as if he had pleaded or demurred to the said Bill of Complaint. And this defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

THADDEUS S. CLARKSON,
Receiver.

By JNO. L. WEBSTER,
his Solicitor.

Upon the back of said Answer of Clarkson, Receiver and Motion for leave to file the same appear indorsements in the words and figures following, to-wit: Docket Q. No. 96. U. S. Circuit Court, District of Nebraska. Farmers' Loan & Trust Company, Plaintiff, vs. American Water Works Company et al., Defendant. Answer of Clarkson, Receiver, and Motion for leave to file same. Filed Jun. 24, 1895. Elmer D. Frank, Clerk. Jno. L. Webster, Attorney for Clarkson, Receiver.

356 Thereupon afterwards, at the May, 1895, Term of said Court, and on the said 24th day of June, 1895, the following proceedings were had and done in said case, as appears of record on folio 817 of Journal T. of said Court, to-wit:

Farmers' Loan & Trust Company,
96. Q. vs.
American Water Works Company, et al.

This day came Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, one of the defendants herein, and asks leave to file the answer herein by him as such receiver of the American Water Works Company of Illinois, to which said motion was attached a copy of said answer and made a part thereof.

Whereupon the Court being advised in the premises, denied said motion, to which order of the Court said Clarkson then and there duly excepted.

357 Thereupon afterwards, at the May 1895 Term of said Court, on said 24th day of June, 1895, the following

proceedings were had and done in said case as appears of record on folio 818 Journal "T" of said Court, to-wit:

DECREE.

The Farmers Loan & Trust Company,
96 Q. vs.
The American Water Works Company, a corporation organized and existing under the laws of the state of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust, as suspended Receiver of the said American Water Works Company of New Jersey and Alonzo B. Hunt, temporary Receiver of said Company.

This cause having been set down to be heard on the 7th day of May last past, on that day, E. Hyde Rust Receiver of the American Water Works Company of New Jersey, called [to] the attention of the Court to his motion for leave to file the joint and several answer- of himself and of said Company made on the 17th of November, 1894.

Thereupon, it was ordered and decreed that the said motion be and the same was overruled and denied, to which the said Rust then and there duly excepted. And thereupon the demurrer of the Farmer's Loan & Trust Company and the Receivers Bierbower and Hunt to the said Cross-bill of said Rust, was argued by counsel and it was then and there ordered and adjudged that the same be sustained; to which the said Rust then and there excepted. And it is now here ordered, adjudged and decreed that the said Cross-bill be and the same is hereby dismissed with leave to allege the matters thereof upon the proceedings hereinafter provided for, touching the distribution of the proceeds arising from the sale of the premises hereinafter ordered and decree-. Thereupon the said Rust duly excepted to the said orders and decree, and
358 prays an appeal to the Circuit Court of Appeals, which is hereby allowed upon the condition that he file a bond in the penal sum of $1,000.00 for costs on such appeal. And thereupon on the day aforesaid, this cause came on to be heard upon the pleadings and proofs and the exhibits mentioned and referred to, in the pleadings, depositions and stipulations filed in this cause, and was argued by counsel.

And the Court finds that on the 20th of July 1892, the Court of Chancery of the State of New Jersey appointed E. Hyde Rust, Receiver in insolvency of the defendant the American Water Works Company, a corporation organized and existing under the laws of that State. That by an order of this Court

bearing date the 23rd of September 1892, the said Rust was recognized by this Court as such Receiver of said Company, and was placed in charge of its property in this District hereinafter described. That by an order of this Court bearing date the 15th of July, 1893, the said Rust was suspended as such Receiver, and the defendant Alonzo B. Hunt was appointed temporary Receiver of said property, and in pursuance of said order, and on the day of its date, the said Hunt took and until the filing of the bill in this cause, held possession of said property, when he surrendered the same into the hands of Ellis L. Bierbower and Alonzo B. Hunt who by order of this Court bearing date on said day, were appointed Receivers of said property.

This court further finds that the defendant the American Water Works Company a corporation organized and existing under the laws of the State of Illinois, made to the plaintiff two several mortgages in the bill described, and at the several times of their respective dates, and thereupon made [made] and issued, and the plaintiff certified the bonds secured by said mortgages the principal of which amounted to Three Million Six Hundred Thousand Dollars ($3,600,000.00) of which bonds
Two million ($2,000,000.00) drew interest at the rate
359 of five per cent per annum, and one Million six Hundred
Thousand ($1,600,000.00) drew interest at the rate of six per cent per annum, which interest was represented by coupons attached to the said bonds; that of the interest maturing on the 1st of January 1892, coupons amounting to thirty-six Thousand Two Hundred and Seventy-five Dollars ($36,275.00) were not paid when they by their terms became due; of the interest maturing the 1st of July 1892, coupons amounting to Forty-seven Thousand Five Hundred Dollars ($47,500.00) were not paid when the same became due; and of the interest maturing the 1st of January 1892, coupons amounting to Twenty-two Thousand Five Hundred Dollars ($22,500.00) were not paid, when by their terms they became due; all of said coupons still remain due and unpaid. Since the day last aforesaid, no interest has been paid upon the said bonds, although all of them were long before that day, outstanding The plaintiff having in pursuance of the stipulations of said mortgage declared the whole mortgage debt due, the Court finds that for principal and interest, there is due upon the bonds aforementioned, and the coupons thereto attached, Four Million One Hundred and Fifty-nine Thousand, and Fifty-four Dollars ($4,159,054.18) and eighteen cents.

It is therefore ordered, adjudged and decreed as follows:

I. That the defendants The American Water Works Company of Illinois, and The American Water Works Company of New Jersey, either or both of them, pay into the registry of this Court, the said sum of Four Million One Hundred and Fifty-nine Thousand Fifty-four Dollars and eighteen cents ($4,159,054.18) so as aforesaid found due to the plaintiff upon the mortgage debt above mentioned, with interest from this day to the day of payment within Two months from the date of this decree; and in default of so doing, that all and singular the mortgage premises mentioned in the bill of Complaint in this cause, and hereinafter described, be sold at public auction by and under the direction of one of the Mas-
360 ters of this Court; that said sale be made at the North door of the federal court house in the City of Omaha; that the said Master give public notice of the time and place of such sale, according to the course and practice of this Court; that any person or party bidding at such sale and to whom the said Master may strike the premises off, shall at once pay to said Master the sum of Fifty Thousand Dollars ($50,000.00) upon his bid; but should any person or party bidding at such sale to whom the premises may be struck off, neglect or fail pending said sale to pay to said Master the said sum, the said Master at once again offer the premises for sale, and proceed as if such bid had not been made; any party to this suit may become a purchaser at such sale; a majority in amount of the holders of the said bonds, shall have the right by written instrument under the hands of such majority, to fix the sum which it shall be the duty of the plaintiff to bid for said premises on their behalf and for their benefit; but such majority joining in the said request to the said plaintiff, shall make provision to its satisfaction for the payment in cash of all expenses incurred in the execution of the trust declared in the two mortgages, copies of which are attached to the bill, and the proportion of such sum as may be payable to bondholders not joining in the said request. If in pursuance of such request the plaintiff be the purchaser at said sale, it shall hold the property so purchased upon trust for the equal benefit of the bondholders, who shall have required it to buy in the property in their behalf, as their absolute property; all bids save that of the plaintiff shall be payable in gold coin of the United States of present standard of fineness; but the plaintiff may answer its bid by bonds and coupons hereinbefore mentioned, provided, however, that such bid be in pursuance of a request of a majority of the bondholders as hereinbefore provided; and provided further, that the plaintiff shall answer
361 its bid by bonds and coupons, only to the extent of the holding of the bondholders who shall in manner

aforesaid, have requested him to buy in the premises for them; the remaining part of the plaintiff's said bid, shall be paid in gold coin of the United States, of present standard of fineness.

It is further ordered, that the Master report his proceedings in the execution of this decree, with all convenient speed, particularly stating his expenses, fees, disbursements and commissions, on account of such sale; that he deposit in the registry of the Court, all moneys which may be paid to him upon and on account of said sale; and of the filing of his said report, he shall give due notice to each party to this suit. The defendants shall not be entitled to an extension of the time for paying the mortgage debt, beyond the day in that behalf above limited, except by special order of the Court.

II. That the defendants and all persons claiming or to claim from or under them or either of them, and all persons having a lien subsequent to said mortgages, by judgment, decree or otherwise, upon the lands and property hereinafter described, be forever barred and foreclosed of and from all equity of redemption and claim of, in or to said mortgage premises, and every part thereof.

III. Within 60 days from the date of this decree, each holder of the bonds and coupons in the pleadings mentioned, shall file the same with the Clerk of this Court, together with a memorandum of his name, and the amount claimed by him upon the bonds and coupons so filed by him; that at the expiration of said term of 60 days, the matter stand referred to the said Master to compute, ascertain and report to the Court, what is due to each holder of said bonds and coupons and the proportion of the proceeds of said sale, to which upon distribution thereof, he shall be entitled; that upon such reference, said Master shall hear any party presenting any bonds or coupons in support of his right to share in the distri-
362 bution of the proceeds of said sale, and against the right of any other party thereto; that after due notice, any holder of outstanding bonds failing to present the same before said sale, shall not share in said proceeds except by special order of the Court; the terms of which notice if there be occasion therefor, shall be prescribed by an order supplemental hereto. Holders of bonds who shall request the plaintiff to bid in the premises in trust for them as above provided, shall before the sale give notice to the Master that they have joined in such request; and any person failing [failing] so to do, shall not be considered as making such request or as entitled to the benefit of the purchase by the plaintiff, except to the extent of the pro rata share of the purchase price, ascertained to be going to him, and to which he shall be entitled in cash.

IV. The proceeds arising on said sale, shall be applied as follows:

1. So much of the said proceeds [are as] necessary for the purpose shall be applied to pay the expenses, disbursements, fees, cost and commissions of the Master upon the said sale.

2. Thereafter, what shall remain so far as necessary shall be applied to pay the taxable costs of the several officers of the Court.

3. Thereafter and so far as may be necessary the proceeds of said sale shall be applied to pay the plaintiff its costs, expenses, disbursements, fees and commissions, as provided in said mortgage; the amount to be hereafter ascertained and determined by the order of the Court.

4. What shall remain of the said proceeds after the items above mentioned have been paid, shall be applied to the payment in full of coupons which matured prior to the date of this decree, together with interest thereon. Each holder of such coupons shall be entitled to what shall be found
363 due by the Court to him as hereinbefore provided, but all holders of coupons who shall join in a request to the plaintiff to bid in the property in trust for them, shall not be entitled to be paid in money, but shall in lieu thereof, accept a certificate of the Clerk showing their respective interests in the property purchased by the plaintiff.

5. What shall remain of the said proceeds, shall thereafter be distributed and paid to the holders of the bonds as their respective interests shall be ascertained and determined as hereinbefore provided; but such of said bondholders as shall join in a request to the plaintiff to bid in the said property for them, shall not be paid in money, but in lieu thereof, shall take and receive in satisfaction of what shall be coming to them respectively, a certificate of the Clerk showing their interests in the plaintiff's purchase as the same shall have been ascertained and declared by the Court.

The foregoing provisions for the application of the proceeds of said sale, shall be subject to such order or orders, as the Court may hereafter make, for the payment out of the proceeds of said sale, or the moneys which may be realized from the operation of said water works, up to the time of the confirmation of sale, of just charges against the said Trust and the Court reserves the several petitions of Charles Offutt & others now on file [on] which may hereafter be filed, of all parties claiming a lien upon or right to be paid out of the said moneys, and the determination of such petitions; and so

much of the said funds as are necessary for the purpose, shall be retained in the hands of the Receivers, to answer the orders of the Court upon the said petitions until by special order in that behalf, the said funds are discharged. And leave is granted to the said Rust to file his petition in respect of the matters alleged by him in his aforesaid cross-bill, such
364 his petition to be disposed of as other like petitions above referred to.

V. Ellis L. Bierbower and Alonzo B. Hunt having been appointed receivers of the aforementioned property, by order of this Court made at the filing of the bill in this cause, and having received the property from the said Hunt, who before that time held the same as temporary receiver under an order of this Court, the pending receivership shall not be disturbed by or under this decree, until the confirmation of the sale hereinbefore provided for; but the money in their hands or which shall come to their hands in the course of the administration of their said trust, shall be applied as the Court may hereafter in that behalf direct; and the said administration of the trust estate, shall be continued by the receivers, as heretofore under the orders of the Court. Upon the confirmation of said sale and the execution to the purchaser of a deed to the property hereinbefore referred, the said receivers shall deliver possession [of] such purchaser.

VI. That the purchaser of said premises at such sale be let into possession thereof; and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under them or either of them, deliver possession thereof to such purchaser on the production of the Master's Deed for said premises, and a certified copy of the order confirming his report of sale. That upon the confirmation of said sale, the said Master make to the purchaser his deed in due form, conveying the said mortgage premises and property to him; and that if the moneys arising from said sale be insufficient to pay the amount found due to the plaintiff with interest and costs and expenses of sale as aforesaid, that said Master specify the amount of such deficiency in his said report. All other questions are reserved to be hereafter considered by the Court, and any party to this suit may apply to the Court upon the foot of this decree.

365-366 VII. The premises and property authorized to be sold under this decree are known and described as follows:

All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows:

Beginning at the intersection of the west bank of the Missouri River with the South line of Bridge Street in the City of Florence, Douglas County Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence Southerly, along the east line of said right of way, to the South line of State Street in said City; thence easterly along the south line of said State Street to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the North line of Washington Street in said City; thence easterly along the North line of said Washington Street to the east line of Mill Street in said City; thence northerly along the East line of said Mill Street to the Northwest corner of block Two hundred and fifty-eight (258) in said City; thence easterly along the North line of said block Two Hundred and fifty-eight (258) to its intersection with the west of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said city of Florence known and described as Blocks number Two (2), One hundred and twenty-six (126) and Two Hundred and sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam, and Sheffield
367 Streets heretofore vacated in said City of Florence, lying between the west line of Water [Streets] and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the North fifty (50) feet of Lot Eighteen (18) and the West ten (10) feet of the North Fifty (50) feet of lot Seventeen (17), both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of [of] Deeds of said Douglas County.

Also that other parcel of land known as Lot B. in Reservoir Addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7) and Eight (8)

in Block Q. and Lots One (1) Two (2), Five (5) and Six (6), in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said City of Omaha, described as follows:

Beginning at a point on the South line of Burt Street, at the Northeast corner of Block Three Hundred and sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty eight (328) and Three Hundred and Twenty-nine (329) in said City; thence East to the Bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots seven (7) and Ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha,
368 according to a plat of said Addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the South one half of the Northeast one quarter of section seven (7), in township fifteen (15), North of Range Thirteen (13) East of the Sixth Principal Meridian. And all other land in the County of Douglas and State of Nebraska and all the right, title and interest therein whereof the American Water Works Company of Illinois and The American Water Works Company of New Jersey, Defendants in this suit, or either of them is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the City Council of said city, and approved by the Mayor thereof, on [on] the 11th day of June, 1880, and all other ordinances of said city, amendatory thereof and supplementary thereto, also under a certain contract bearing date the 20th of July 1880, between the City of Omaha, party of the first part and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come

to the water works Company of Illinois before the making of its mortgage to the Farmers Loan & Trust Company of date the 1st of July 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County
369 Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17), years passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said City on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets alleys and public places of the Cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the county of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and The American Water Works Company of New Jersey, or either of them, under [any] by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts dues, rentals claims, and demands of every name and nature however arising of either of said companies against the City of Omaha, the City of South Omaha, and the City of Florence, any or either of them, whether such debts dues, demands rentals and claims, have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or
370 either of them. Together with all moneys, now in the hands of the receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of the said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof,

as this Court may have heretofore made or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them, in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands, and moneys which may arise out of or come from the operation of said works shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

The bond of the said companies or either of them which may prosecute such appeal shall in order to operate as a supersedeas, be in the penal sum of $4,500,000.00. But the bond of the said Companies or such one of them as shall prosecute its said appeal shall be in the penal sum of $2,000.00 for costs but not to operate as a supersedeas.

Thereupon the defendants excepted to all and every the provisions of this decree.

(Signed) JOHN A. RINER,
Judge.

Think this decree is all O. K. E. S. D.

O. K. as to form JNO. L. WEBSTER.
O. K. J. M. WOOLWORTH.

371 Thereupon afterwards, to-wit: on the 6th day of July, 1895, Stipulation to omit Maps and Deeds from Transcript was filed in said case which said Stipulation is in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Nebraska.

The Farmers' Loan & Trust Company,

v.

The American Water Works Co. et al.

The plaintiff in the above entitled cause hereby consents that in making the transcript of the record of this Court to be filed in the Court of Appeals on the appeal of the defendants, the Clerk may omit the four several maps on which are delineated the real estate of the plaintiff, marked respectively A. C. D. and J.; also the four several deeds all running to the American Water Works Company of Illinois, one from the City Works Company, marked Exhibit B; one from Smoot, marked Exhibit E., one from Kountze marked Exhibit F.,

and one from Kountze marked Exhibit G., also the heading of the depositions and the certificates thereto.

This stipulation is to save bulk of transcript, and expense of the appellant.

R. S. HALL,
Sol. for Plff.
By J. M. WOOLWORTH,
JNO. L. WEBSTER,
Sol. for Defendants.

Upon the back of said Stipulation appear endorsements in the words and figures following, to-wit:—No. 96 Q. U. S. Circuit Court Dist. of Neb. Farmers Loan & Trust Co. vs. American Water Works Co. et al. Stipulation to omit Maps and Deeds from Transcript. Filed July 6, 1895, E. D. Frank, Clerk.

372 Thereupon afterwards, to-wit on the 6th day of August, 1895, Assignment of Errors was filed in said case, which said Assignment of Errors is in the words and figures following, to-wit:

Circuit Court of the United States for the District of Nebraska.

ASSIGNMENT OF ERRORS.

The Farmers' Loan & Trust Company,
v.
The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt, temporary Receiver of said Company.

Now come the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, The American Water Works Company, a corporation organized and existing under the [lwas] of the State of New Jersey, and Alonzo B. Hunt, temporary receiver of said Company, defendants in the above entitled cause, and say there is manifest error in the record of the proceedings and decree in the above entitled cause, in this, to-wit:

1. The Court erred in finding that the American Water Works Company of the State of Illinois made and executed

the mortgages in the bill of complaint described, for the following reasons: the said mortgages were issued without any legal authority and were beyond the power of the company to make the same; and said mortgages were ultra vires and void; were made without statutory authority; were void as against public policy; were made in violation of the
373 laws and policy of the State of Nebraska, and further that the property of the Water Works Company was not subject to mortgage.

2. Said Court erred in said decree wherein it set forth and defined the amount of coupons due and unpaid January 1st, 1892, and July 1st, 1892, in the particulars to-wit: that said coupons were not valid outstanding obligations of the defendant companies; that such of said coupons as were outstanding had been sold by the bondholders, and purchased by other persons for the purpose of avoiding a forfeiture of the mortgages, with the knowledge and consent of the said bondholders who thereby waived forfeiture on account of such nonpayment, and thereby waived the right of foreclosure.

3. That said judgment and decree is erroneous in that it failed to find and set forth the total amount if any, of coupons due and unpaid up to the date of the decree and in that it failed to make provision by which the defendant companies might take up, pay and discharge such defaulted coupons and thereby prevent a forfeiture of the said mortgages and a sale of the said property.

4. That there is error in that part of said decree wherein it finds the total amount due upon the said bonds and coupons to be four million, one hundred fifty-nine thousand, fifty-four and 18/100 dollars ($4,159,054.18) for the following reasons, to-wit: That there is error in the amounts of the computation; that said bonds were not sold for value to bona fide holders without notice of the infirmities therein; that said bonds were not negotiated and sold, as provided in the terms of the mortgage so as to make the said mortgages security for the said bonds; that one million two hundred thousand dollars ($1,200,000.00) of par value of said bonds were used to pay for stock in another water Company, in violation of the law and public policy; that said bonds were not negotiable instruments.

374 5. That the Court erred in that part of its decree wherein it found that the Farmers' Loan & Trust Company had declared the whole amount of the mortgage debt due, and wherein by said decree it is found that the whole amount of said principal and interest of said bonds is due,

and more particularly for the reasons that there was no formal declaration of the plaintiff company declaring the principal of the said mortgages to be due; that there was no sufficient request for any such declaration on the part of the Trust Company; that by the terms of the bonds there was no provision by which the same should become due upon the failure to pay interest; that said bondholders had forfeited any existing right to ask that the same be declared due, by reason of the sale of their coupons; that said bonds were not valid outstanding obligations of the defendant companies or either of them.

6. The Court erred in that part of the decree wherein it provided that upon default of the payment of the total amount of bonds and coupons,to-wit: $4,159,054.18, within a period of two months from the date of said decree, that such right of redemption should be forfeited and the property sold, to satisfy the said mortgage debt in this, to-wit: That said limitation of time is so short as to be unreasonable in that it requires a payment of both principal and interest within the period of two months to avoid a forfeiture of the mortgages, and to prevent the sale, and in that the amount required to be so paid is excessive.

7. That the Court erred in that part of its decree which required all bids other than that of the plaintiff to be payable in gold coin of the United States of the present standard of fineness.

8. That there is error in said decree in that it does not provide or permit any one or more of the bondholders to
375 answer any bid they may make as purchasers of said property in bonds of the company but only provides for the use of bonds in payment of the purchase money when such bids shall be made by the Farmers' Loan & Trust Company.

9. That there is error in that part of the decree wherein it provides for the plaintiff company being a purchaser at said sale at the request of certain bondholders, in that it does not make provision that the bonds so turned in by the plaintiff company shall be in the ratio or proportion that said bonds shall bear the whole amount of bonds outstanding when applied to the total amount of the purchase money but by its terms it permits the bonds so to be turned in by the plaintiff company to be at the par value of the bonds so turned in as part of such purchase money.

10. That the Court erred in that part of its decree wherein it made provision for the sale of the property under the decree for that under the law of the land as applied to mort-

gages upon water works companies the remedy of the mortgagee if any there be is not by a sale of the property under a decree of foreclosure, but that such remedy is confined to a sequestration of the earnings of the Company.

11. That there is error in that part of the decree wherein it is provided and decreed that the defendants be forever barred and foreclosed of and from all equity of redemption of the said mortgaged premises.

12. That the said Court erred in that part of the decree wherein it provided for the sale of "All the rights, interest, title, claims and demands, of every name and nature which have in any wise come to the American Water Works Company of Illinois and The American Water Works Company of New Jersey or either of them in any wise whatever arising under a certain ordinance of the City of Omaha known as Ordinance No. 423, entitled "An Ordinance to authorize
376 and procure the construction and maintenance of water works in the City of Omaha, state of Nebraska" passed by the City Council of said City and approved by the Mayor thereof on the 11th of June, 1880, and of other ordinances of said City amendatory thereof and supplementary thereto."

13. That there is error in that part of the decree wherein it provides for the sale of a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which have come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st. of July, 1887; and also the rights of the said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance No. 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the Streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska."

14. That there is error in said decree wherein it provides for the sale of "All rights of said company under an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes and to contract with the American Water Works Company therefor", and the contract in pursuance thereof between said City and said company."

15. That there is error in that part of the decree wherein it provides for the sale of all and singular the pipes, mains,

valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence.

16. That there is error in that part of the decree wherein it provides for the sale of all machinery, pumps, boilers and engines of the said water companies.

377 17. That there is error in that part of the decree wherein it provides for the sale of all water rents from private consumers wherever situate, and all debts, dues rentals, claims, and demands of every name and nature, however arising, to either of said companies against the City of Omaha, the city of South Omaha, and the City of Florence, or any or either of them, whether such debts, dues, demands and claims have heretofore accrued, or are now existing, or may at any time hereafter accrue, to said companies or either of them.

18. That there is error in said decree wherein it provides that the supersedeas bond shall be fixed in the penal sum of four million five hundred thousand dollars ($4,500,000.)

THE AMERICAN WATER WORKS COMPANY, OF ILLINOIS,
THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY, and ALONZO B. HUNT,
Temporary Receiver of said Water Company.
By JNO. L. WEBSTER,
Solicitor.

Upon the back of said Assignment of Errors appear endorsements in the words and figures following, to-wit:

Docket Q. No. 96. U. S. Circuit Court, District of Nebraska. Farmers' Loan & Trust Company, Plaintiff, vs. American Water Works Company et al., Defendants. Assignment of Errors. Filed Aug. 6, 1895. E. D. Frank, Clerk. Jno. L. Webster, Attorney for Defendants.

378 Thereupon afterwards, to-wit: On said 6th day of Aug. 1895, a Petition praying an Appeal was filed in

said case, which said Petition praying an Appeal is in the words and figures following, to-wit:

Circuit Court of the United States for the District of Nebraska.

PETITION PRAYING AN APPEAL.

The Farmers' Loan & Trust Company,

v.

The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of said American Water Works Company of New Jersey, and Alonzo B. Hunt, temporary Receiver of said Company.

Now come the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, and Alonzo B. Hunt, temporary Receiver of said Company, defendants in the above entitled cause, and complaining of the plaintiff aver:

That on the 24th day of June, 1895, said plaintiff recovered a judgment and decree against these defendants herein in said cause and in said Court, in which among other things it was decreed.

a. That the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, made to the plaintiff two several mortgages in the bill of complaint described and caused to be issued and the complainant certified to bonds secured by said mortgages,
379 the principal of which amounted to three million six hundred thousand dollars ($3,600,000.00).

b. That in said decree it is further found that default had been made in the payment of interest coupons from said bonds, and that the plaintiff was entitled to a foreclosure of the said mortgages, and found the amount due of principal and interest to be four million, one hundred fifty-nine thousand, fifty-four and 18/100 dollars ($4,159,054.18)

c. And which said judgment and decree directed the payment into Court by the American Water Works Company of Illinois, and the American Water Works Company of New

Jersey, or either of them, of the sum of $4,159,054.18 within two months from the date of said decree, and that in default thereof all and singular the mortgaged premises in the bill of complaint described to be sold under direction of one of the Masters of said Court to satisfy the amount of said bonds and mortgages.

And these defendants allege that they were prejudiced by the various orders, judgments and decree, and that there is error in the proceedings of the Court by which said judgment and decree was obtained, and that the said judgment and decree is erroneous in matters and things more particularly set forth in the assignment of errors filed herewith and by the record in said cause.

And by reason of said errors the said defendants pray that they may be allowed an appeal from said judgment and decree of said Court in said cause to the United States Circuit Court of Appeals for the Eighth Circuit, and that a transcript of the record and proceedings duly authenticated may be sent to said Court of Appeals, whereby said judgment and decree may be reversed and whereby these defendants may be given such other and further relief as may be just and proper.

THE AMERICAN WATER WORKS COMPANY, OF ILLINOIS,
THE AMERICAN WATER WORKS COMPANY OF NEW JERSEY, and ALONZO B. HUNT.
Temporary Receiver of said Company.
By JNO. L. WEBSTER, Solicitor.

380 On reading the foregoing Petition it is ordered that the Appeal be allowed as prayed.

Aug. 6, 1895. JOHN A. RINER, Judge.

Upon the back of said Petition praying an Appeal appear endorsements in the words and figures following, to-wit: No. 96 Doc. Q. U. S. Circuit Court, District of Nebraska. The Farmers' Loan and Trust Company, Plaintiff, vs. The American Water Works Company et al., defendant. Petition praying an Appeal. Filed Aug. 6, 1895. E. D. Frank, Clerk. Jno. L. Webster, Attorney for Defendants.

Thereupon afterwards, at the May 1895 Term of said Court, on the 6th day of August, 1895, the following proceedings were

had and done in said case, as appears of record on folio 96 Journal "U" of said Court, to-wit:

ORDER ALLOWING APPEAL.

The Farmers' Loan & Trust Company,

vs.

The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey and Alonzo B. Hunt, temporary Receiver of said Company.

This cause coming on to be heard on the petition of the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, and Alonzo B. Hunt, Temporary Receiver of said Company, praying
380½ an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, it is hereby ordered by the Court that the Appeal be and is hereby allowed to the United States Circuit Court of Appeals as prayed in said petition.

381 Thereupon afterwards, to-wit: On said 6th day of August, 1895, Assignment of Errors by Thaddeus S. Clarkson, Receiver, was filed in said case, which said Assignment of Errors is in the words and figures following, to-wit:

Circuit Court of the United States for the District of Nebraska.

ASSIGNMENT OF ERROR.

The Farmers' Loan & Trust Company,

v.

The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; the American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt temporary Receiver of said Company.

Now comes Thaddeus S. Clarkson, Receiver of The American Water Works Company of Illinois, one of the defendants in the above entitled cause, and avers that there is manifest

error in the record of the proceedings and decree in the above entitled cause, in this to-wit:

1. That the said Court erred in refusing to allow Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois to file his amended and supplemental answer herein.

2. The Court erred in finding that the American Water Works Company of the State of Illinois made and executed the mortgages in the bill of complaint described, for the following reasons: the said mortgages were issued withou- any legal authority and were beyond the power of the Company to make the same; and said mortgages were ultra vires and void, were made without statutory authority; were void as against public policy; were made in violation of the
382 laws and policy of the State of Nebraska, and further that the property of the Water Works Company was not subject to mortgage.

3. Said Court erred in said decree wherein it set forth and defined the amount of coupons due and unpaid January 1st, 1892, and July 1st, 1892, in the particulars, to-wit: that said coupons were not valid outstanding obligations of the defendant companies; that such of said coupons as were outstanding had been sold by the bondholders, and purchased by other persons for the purpose of avoiding a forfeiture of the mortgages, with the knowledge and consent of the said bondholders who thereby waived forfeiture on account of such non payment, and thereby waived the right of forfeiture.

4. That said Judgment and decree is erroneous in that it failed to find and set forth the total amount if any, of coupons due and unpaid up to the date of the decree and in that it failed to make provision by which the defendant companies might take up, pay and discharge such defaulted coupons and thereby prevent a forfeiture of the said mortgages and a sale of the said property.

5. That there is error in that part of said decree wherein it finds the total amount due upon the said bonds and coupons to be four million, one hundred fifty-nine thousand fifty-four and 18/100 dollars ($4,159,054.18) for the following reasons, to-wit: that there is error in the amounts of the computation; that said bonds were not sold for value to bona fide holders without notice of the infirmities therein; that said bonds were not negotiated and sold, as provided in the terms of the mortgage so as to make the said mortgages security for the said bonds; that one million two hundred thousand dollars ($1,200,000.00) of par value of said bonds were used

to pay for stock in another water company, in violation of the law and public policy; that said bonds were not negotiable instruments.

383 6. That the Court erred in that part of its decree wherein it found that the Farmers' Loan & Trust Company [and] declared the whole amount of the Mortgage debt due, and wherein by said decree it is found that the whole amount of said principal and interest of said bonds is due, and more particularly for the reasons that there was no formal declaration of the plaintiff company declaring the principal of the said mortgages to be due; that there was no sufficient request for any such declaration on the part of the Trust Company; that by the terms of the bonds there was no provision by which the same should become due upon the failure to pay interest; that said bondholders had forfeited any existing right to ask that the same be declared due, by reason of the sale of their coupons; that said bonds were not valid outstanding obligations of the defendant companies or either of them.

7. The Court erred in that part of the decree wherein it provided that upon default of the payment of the total amount of bonds and coupons, to-wit: $4,159,054.18, within a period of two months from the date of said decree, that such right of redemption should be forfeited and the property sold, to satisfy the said mortgage debt in this, to-wit: that said limitation of time is so short as to be unreasonable in that it requires a payment of both principal and interest within the period of two months to avoid a forfeiture of the mortgages, and to prevent the sale, and in that the amount required to be so paid is excessive.

8. That the Court erred in that part of its decree which required all bids other than that of the plaintiff to be payable in gold coin of the United States of the present standard of fineness.

9. That there is error in said decree in that it does not provide or permit any one or more of the bondholders to answer any bid they may make as purchasers of said property in bonds of the Company but only provides for the use of bonds in payment of the purchase money when such bids shall be made by the Farmers' Loan & Trust Company.

384 10. That there is error in that part of the decree wherein it provides for the plaintiff company being a purchaser at said sale at the request of certain bondholders, in that it does not make provision that the bonds so turned in by the plaintiff Company shall be in the ratio or propor-

tion that said bonds shall bear the whole amount of bonds outstanding when applied to the total amount of the purchase money but by its terms it permits the bonds so to be turned in by the plaintiff company to be at the par value of the bonds so turned in as part of such purchase money.

11. That the Court erred in that part of its decree wherein it made provision for the sale of the property under the decree for that under the law of the land as applied to mortgages upon water works companies the remedy of the mortgagee if any there be is not by a sale of the property under a decree of foreclosure, but that such remedy is confined to a sequestration of the earnings of the Company.

12. That there is error in that part of the decree wherein it is provided and decreed that the defendants be forever barred and foreclosed of and from all equity of redemption of the said mortgaged premises.

13. That the Court erred in that part of the decree wherein it provided for the sale of "All the rights, interest, title, claims and demands, of every name and nature which have in any wise come to the American Water Works Company of Illinois and The American Water Works Company of New Jersey or either of them in any wise whatever arising under a certain ordinance of the City of Omaha known as Ordinance No. 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska" passed by the City Council of said City and approved by the Mayor thereof on the 11th of June,
1880, and of other ordinances of said city amendatory
385 thereof and supplementary thereto."

14. That there is error in that part of the decree wherein it provides for the sale of a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which have come the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887; and also the rights of the said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance No. 29, entitled "An Ordinance granting an exclusive right to lay a system of water Works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska."

15. That there is error in said decree wherein it provides for the sale of "All rights of said Company under an ordinance

of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence, and its inhabitants for fire and domestic purposes and to contract with the American Water Works Company therefor," and the contract in pursuance thereof between said City and said Company".

16. That there is error in that part of the decree wherein it provides for the sale of all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence.

17. That there is error in that part of the decree wherein it provides for the sale of all machinery, pumps, boilers and engines of the said water companies.

18. That there is error in that part of the decree wherein it provides for the sale of all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature, however aris-
386 ing, to either of said companies against the City of Omaha, the City of South Omaha, and the City of Florence, or any or either of them, whether such debts, dues, demands and claims have heretofore accrued, or are now existing, or may at any time hereafter accrue, to said companies or either of them.

19. That there is error in said decree wherein it provides that the supersedeas bond shall be fixed in the penal sum of four million five hundred thousand dollars ($4,500,000.)

THADDEUS S. CLARKSON,
Receiver of the American Water Works Company of Illinois.
By JNO. L. WEBSTER,
Solicitor.

Upon the back of said Assignment of Errors appear endorsements in the words and figures following, to-wit: Docket Q. No. 96. U. S. Circuit Court, District of Nebraska. The Farmers Loan & Trust Company, plaintiff, vs. American Water Works Company et al., Defendant. Assignment of Errors of Thaddeus S. Clarkson, Receiver. Filed Aug. 6, 1895. E. D. Frank, Clerk. Jno. L. Webster, Attorney for Clarkson, Receiver.

Thereupon afterwards, to-wit: On said 6th day of August, 1895, Petition of Clarkson Receiver praying an Appeal was

filed in said case, which said Petition praying an Appeal is in the words and figures following, to-wit:

Circuit Court of the United States for the District of Nebraska.

PETITION PRAYING AN APPEAL.

The Farmers' Loan & Trust Company,

v.

The American Water Works Company a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt temporary Receiver of said Company.

387 Now comes Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, and complaining of the plaintiff says:

That by an order issued out of the Circuit Court of the United States for the District of Nebraska, on the 2nd day of May, 1895, he was appointed Receiver by ancillary proceedings of all the property, assets and effects of whatsoever kind and nature within the District of Nebraska, of the American Water Works Company of Illinois, and was directed by the order of his appointment to make defences to all suits pending against the said Company.

That at and before the entry of the decree herein, to-wit: on the 24th day of June, 1895, this petitioner asked leave to file his answer in this cause and to make defences to said action, and which leave was denied by the Court.

This petitioner further represents that on the 24th day of June, 1895, this Court entered in said cause its final decree of foreclosure of the mortgages in the bill of Complaint described, in which there is manifest error as will more particularly appear by the assignment of errors filed herewith. And by reason of said errors the said Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, prays that he may be allowed an appeal from the said order and judgment of the Court denying him leave to file his answer herein, and from the decree of said Court in said cause, to the United States Circuit Court of Appeals for the Eighth Circuit, and that a transcript of the record and proceedings duly authenticated may be sent to said Court of Appeals, whereby said judgment and decree may be reversed, and whereby this Re-

ceiver may be given such other and further relief as may be just and proper.

388 THADDEUS S. CLARKSON,
Receiver of the American Water Works Company
(of Ill.)

By JOHN L. WEBSTER, his solicitor.

On reading the foregoing petition it is ordered that the appeal be allowed as prayed.

Leave to file the answer of Thaddeus S. Clarkson, receiver in this case was denied for the reason that this case was argued and finally submitted on the 7th. day of May, 1895, said receiver and his counsel being present, his counsel taking part in the final argument, and no application or request to file said answer was then made, nor was said application to file said answer made at any other time until the date and immediately before the final decree in said cause was entered, to-wit: the 24th. day of June, 1895.

Aug. 6, 1895. JOHN A. RINER,
Judge.

Upon the back of said Petition of Clarkson, Receiver praying an Appeal, appear endorsements in the words and figures following, to-wit: Docket Q. No. 96. U. S. Circuit Court, District of Nebraska. The Farmers' Loan & Trust Company, plaintiff, vs. American Water Works Company et al., defendants. Petition of Clarkson, Receiver, praying an Appeal. Filed Aug. 6, 1895. E. D. Frank, Clerk. Jno. L. Webster, Attorney for Clarkson, Receiver.

Thereupon afterwards, at the May 1895 Term of said Court, on the 6th day of August, 1895, the following proceedings were had and done in said case, as appears of record on folio 97 Journal "U" of said Court, to-wit:

ORDER ALLOWING APPEAL.

The Farmers' Loan & Trust Company,

vs.

The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and Existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt, Temporary Receiver of said Company.

388½ This cause coming on to be heard on the petition of Thaddeus S. Clarkson, Receiver of the American Water

Works Company of Illinois, praying an Appeal to the United States Circuit Court of Appeals for the Eighth Circuit, it is hereby ordered by the Court that the Appeal be and is hereby allowed to the United States Circuit Court. of Appeals, as prayed in said petition.

Leave to file the Answer of said Thaddeus S. Clarkson, Receiver in this case was denied for the reason that this case was argued and finally submitted on the Seventh day of May, 1895, said Receiver and his Counsel being present, his Counsel taking part in the final argument and no application or request to file said answer was then made, nor was said application to file said answer made at any other time until the date and immediately before the final decree in said cause was entered, to-wit: 24th day of June, 1895.

389 Thereupon afterwards, to-wit: on said 6th day of August 1895, a Bond was filed in said case, which said Bond is in the words and figures following, to-wit:

Know all Men by These Presents, That we, The American Water Works Company (of Illinois) The American Water Works Company (of New Jersey) A. B. Hunt Temporary Receiver of American Water Works Company (of New Jersey) and Thaddeus S. Clarkson, Receiver of American Water Works Company (of Illinois) as Principals and John A. Fuller are held and firmly bound unto the Farmers' Loan and Trust Company in the full and just sum of Two Thousand Dollars to be paid to the said Farmers Loan & Trust Company its heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this ..... day of July in the year of our Lord one thousand eight hundred and ninety Five.

Whereas, lately at the May Term, A. D. 1895, of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between The Farmers Loan & Trust Company plaintiff and The American Water Works Company (of Illinois) The American Water Works Company (of New Jersey) E. Hyde Rust, Suspended [Re-] Receiver and A. B. Hunt Temporary Receiver of last named company defendants a decree was rendered against the said defendants and the said American Water Works Company (of Illinois) and Thaddeus S. Clarkson, Receiver thereof, The American Water Works Company (of New Jersey) and A. B. Hunt Temporary Receiver thereof have obtained an allowance of an appeal from the said Court to reverse the decree and Judgment in the aforesaid suit, and a citation directed to the said The Farmers Loan & Trust Company citing and admonishing it to be and appear

in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said Appellants shall prosecute said Appeal to effect, and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

THE AMERICAN WATER WORKS COMPANY of Illinois, and Thaddeus S. Clarkson, Receiver thereof. [Seal]

THE AMERICAN WATER WORKS COMPANY of New Jersey, and A. B. Hunt, Temporary Receiver thereof,

By JNO. L. WEBSTER their Solicitor. [Seal]

JOHN A. FULLER. [Seal]

Approved by

JOHN A. RINER, Judge.

Aug. 6, 1895.

No. 96 Q. United States Circuit Court, District of Nebraska. The Farmers Loan & Trust Company vs. The American Water Works Company, et al. Bond. $..... Filed 6th day of August, 1895. E. D. Frank, Clerk.

390 And also on said 6th. day of August, 1895, Citations were issued in said case, and returned and filed August 26th. 1895, the following of which are the originals.

391 The United States of America. To The Farmers Loan and Trust Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an Appeal allowed filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein the American Water Works Company (of Illinois) and the American Water Works Company (of New Jersey) and Alonzo B. Hunt, Temporary Receiver of the American Water Works Company (of New Jersey) are Appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said Appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, Judge of the District Court for the District of Wyoming assigned to hold the Circuit Court of the United States for the District of Nebraska, this sixth day of August in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the United States Circuit Court District of Nebraska.

JOHN A. RINER,

United States District Judge, assigned to hold the Circuit Court for the District of Nebraska.

Due personal service of within citation admitted this 26 of August, 1895.

I. M. WOOLWORTH,
For Farmers Loan & Trust Co.

Doc. Q. No. 96. United States Circuit Court, District of Nebraska. The Farmers Loan and Trust Company vs. American Water Works Company et al. Citation. Filed 26th day of August 1895. E. D. Frank, Clerk.

392 The United States of America. To The Farmers Loan and Trust Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein Thaddeus S. Clarkson Receiver of The American Water Works Company, a corporation of the State of Illinois is appellant and you are Appellee to show cause, if any there be, why the judgment rendered against the said Appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner Judge of the District Court for the District of Wyoming assigned to hold the Circuit Court of the United States for the District of Nebraska, this sixth day of August in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the United States Circuit Court. District of Nebraska.

JOHN A. RINER,

United States District Judge, for the District of Wyoming, assigned to hold the Circuit Court for the District of Nebraska.

Due personal service of within citation admitted this 26" of August, 1895.

I. M. WOOLWORTH,
For Farmer's Loan & Trust Co.

Doc. Q. No. 96. United States Circuit Court, District of Nebraska. The Farmers' Loan and Trust Company vs. American Water Works Company et al. Citation. Filed 26th day of August, 1895. E. D. Frank, Clerk.

393 Thereupon afterwards, to-wit: On the 27th day of August, 1895, Assignment of Errors was filed in said case, which said Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court within and for the District of Nebraska.

ASSIGNMENT OF ERRORS.

The Farmers Loan & Trust Company, Complainant,
No. 96 Doc. Q. In Equity. v.
The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust, as Suspended Receiver of the said The American Water Works Company of New Jersey, and Alonzo B. Hunt, Temporary Receiver of said Company, Defendants.

Now on the 1st day of August, 1895, came the said defendants E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey), and the said The American Water Works Company (of New Jersey) by E. Hyde Rust, its Receiver, by Chas. Offutt, their solicitor, and say that the decree signed and enrolled in this cause on the 24th day of June, 1895, is erroneous and against the legal and equitable rights of these defendants, and each of them, for the following reasons, to-wit:

1. These said defendants had not, either of them, at any time, been served with a subpoena in Chancery or other process of this Court, nor had there ever at any time been any order served upon these defendants or either of them, directing these defendants or either of them, to appear, plead, answer or demur herein at any time or under any circumstances.

2. The order entered herein "on absent defendants"
394 on December 1st, 1893, requiring these defendants "to appear and plead, answer or demur to the Complainant's

Bill of Complaint, on or before Monday February 5th, 1894, and that in default thereof an order be entered in this cause taking this Bill of Complaint pro confesso" was improvident and erroneous and this Court was without power or authority to make said order for the reason that the affidavit for said order on non-resident defendants was insufficient and defective in the particulars as follows, to-wit:

a. Said affidavit did not state the place of residence of the non-resident defendants, or that their place of residence was unknown, or that it was impossible to obtain actual service upon these said defendants, or either of them.

b. Said affidavit did not allege that any diligence had been used with respect to obtaining said service upon these defendants, or either of them.

c. Said affidavit did not allege that service upon these defendants, or either of them, was not practicable; and the truth is that said allegations could not have been made, because said Complainant knew that the order directing these defendants to appear, and plead, answer or demur by a day certain, could at any time be served upon either of these defendants in the State of New Jersey, as will fully appear from the allegations and averments made in said Complainant's Bill of Complaint herein.

3. The order of the Court entered on December 1st, 1893, requiring these defendants "to appear and plead, answer or demur to the Complainant's bill of Complaint on or before Monday February 5th, 1894, and in default thereof that an order be entered in this cause taking this Bill of Complaint pro-confesso", was never served upon any person or persons in possession or charge of the property described in said Bill of Complaint, nor was a copy of any such order served upon any person whomsoever.

395 4. The Court refused and denied the application of these defendants to file their joint and several answer voluntarily tendered herein on November 17th, 1894, which said motion to file said answer was fully argued and duly submitted on November —— 1894, and held under advisement and not disposed of by the trial court until this cause came on for final hearing on the ——day of June, 1895.

5. The Court overruled and refused to entertain the objections of these defendants or either of them, to the proofs submitted by the Complainant herein, whereas said proofs were taken without any notice to these defendants or either of them.

6. The Court sustained the general demurrer of the Complainant to the separate Cross-bill of the Defendant E. Hyde

Rust, Receiver of the American Water Works Company (of New Jersey), filed herein on July 17th, 1894.

7. The Court did not decree and adjudge to said E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey), the relief prayed for in his said Cross-bill.

8. The Court did not adjudicate and determine as to the right of priority between the claim of the Complainant herein for the foreclosure of its alleged mortgage, and the demands of the general or floating creditors of said American Water Works Co. for labor, material and machinery placed by them in said property.

9. The Court appointed the receivers herein at the time the Bill of Complaint was exhibited, or immediately thereafter, on an *ex parte* application, and without any notice whatever to any parties in interest, though at that time all the said property described in said Bill of Complaint and placed in the hands of the Receivers, was in the hands of a Receiver of the trial Court in the case therein pending under the name and style of The Denver City Water Works Company, et al, Complainants, v. The American Water Works Company, et al, Defendants, the same being Docket "P", Folio 35 of the files and records of the Court.

396 10. The property on which said mortgages were sought to be foreclosed, at the time of the exhibition of the Bill of Complaint, and at the time of the appointment of the Receivers herein, then being in the custody and possession of Receivers under orders of record herein, in the case of the Denver City Water Works Co., et al. vs. The American Water Works Co. et al, the same being Docket P Folio 35 of the files and records of the Court, said Complainant was without right or authority to prosecute or maintain this said action, except upon condition that the same be prosecuted by said Complainant by intervention and a continuation or extension of the receivership in the said case of The Denver City Water Works Co. et al., v. The American Water Work Co. et al, being Docket P., Folio 35, there could not be two receivers of the same property as there was in this case.

11. The Court permitted said action to remain upon its docket from October 9th, 1893, the date the Bill of Complaint was exhibited, continuously until the decree was entered herein on June 24th 1895, during which time no diligence whatever was shown in the prosecution of said cause by said Complainant, either by service of process or preparation of the same for hearing in other particulars, but notwithstanding this fact the Court imposed no limitations or restrictions on

the continuation of the receivership herein with respect to the payment of the general or unsecured creditors for labor, material and machinery put into the Water Works plant at Omaha by said general creditors, whereas said receivers having been appointed herein on an *ex parte* application and without any notice whatever to any person or party, at a time when the accrued earnings of said water works plant described in the Bill of Complaint, (and all of which said earnings were then under the control of the Court), exceeded the amount of the entire indebtedness of said plant for labor, material and machinery recently theretofore furnished for the purpose
397 of keeping said plant "a going concern," it was the duty of the Court to have directed the payment of said general creditors out of the funds earned and in the hands of the Court at the time the Bill herein was exhibited.

12. The Court did not direct that the funds in Court at the time of the exhibition of the Bill of Complaint, and which had then been earned under the receivership up to that time, should first be used in the payment of the expenses of the preceding receivership, including the receivership of this defendant E. Hyde Rust.

13. The Court did not direct that the funds in Court on the appointment of the receivers at the time the Bill of Complaint was exhibited herein, should be chargeable with debts for material, machinery and labor furnished to said Omaha plant by divers creditors as set out in the answer of these defendants tendered herein, which said machinery, material and labor was so furnished to said Omaha plant by said creditors in order to keep the said plant a going concern, and shortly before the exhibition of the Bill of Complaint herein.

14. The Court did not ratify or confirm, or give any faith or credit whatever to the settlement of this defendant E. Hyde Rust, Receiver's accounts in the Court of Chancery of New Jersey, but disregarded the same and made no order or decree whatever with respect thereto, whereas, having transferred all of the property of the said Water Works plant in the State of Nebraska, at the time the Bill of Complaint was exhibited, to the receivers of said property appointed in pursuance of the prayer of the Bill of Complaint, it was the duty of the Court to proceed at once to settle the said prior receivership, and to use all the funds which had been earned or received under said prior receiver-hip in paying the expenses of said prior receivership, together with all the debts for material, labor and
398 machinery furnished to said Omaha plant.

15. The Court should not have regarded or entertained the appearance of the defendant The American Water

Works Company (of New Jersey) through Mr. John L. Webster as solicitor, for the reason that this defendant E. Hyde Rust, being duly constituted and appointed by the New Jersey Court of Chancery as Receiver of said The American Water Works Company (of New Jersey) and the officers stockholders and directors of said New Jersey Company and said Company having been by said court enjoined from exercising any of the rights, privileges or franchises pertaining to them respectively were without warrant or authority to employ any solicitor to appear in the name of said New Jersey company in this or any other Court, and the defendant E. Hyde Rust as Receiver solely and alone had the right to appear and plead or answer in the name of said New Jersey Company.

16. The Court denied these said defendants, and each of them, the right to plead or answer herein.

17. The Court should not have granted the Complainant the relief prayed for in its said Bill of Complaint, or any relief whatever herein, but should have dismissed the said Bill of Complaint and denied the said Complainant any relief whatever.

18. In its said decree the Court found that The American Water Works Company (of Illinois) made and executed the mortgages in the Bill of Complaint described, whereas the said mortgages were executed without any legal authority, and were beyond the power of said Illinois Company to make, and said mortgages were without statutory authority, were contrary to public policy, and the property herein described and sought to be covered by said mortgages, was not the subject of mortgage.

19. The Court should have granted the relief prayed for in the joint and several answer of these defendants tendered herein.

399 Wherefore, these said defendants, and each of them, pray that said decree be reversed, and that the said Court may be directed to enter a decree in accordance with the prayer of the Cross-bill of the defendant E. Hyde Rust, Receiver, and with the prayer of the joint and several answer of these defendants tendered herein.

CHAS. OFFUTT,
Solicitor for said Defendants.

Dated at Omaha, Neb., August 1st, 1895.

Upon the back of said Assignment of Errors appear endorsements in the words and figures following, to-wit:

No. 96 Docket Q. In U. S. Circuit Court, District of Nebraska. Farmers' Loan & Trust Company, Complainant, vs.

American Water Works Co. et al., defendants. Assignment of Errors. Filed August 27, 1895. E. D. Frank, Clerk. Chas. Offutt, Solicitor for Defendants.

Thereupon afterwards, to-wit: on said 27th day of August, 1895, Petition on Appeal was filed in said case, which said Petition on Appeal is in the words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska.

PETITION ON APPEAL.

The Farmers Loan & Trust Company, Complainant,

In Equity. No. 96 Doc. Q. v.

The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust, as Suspended Receiver of the said The American Water Works Company of New Jersey, and Alonzo B. Hunt, Temporary Receiver of said
400 Company, Defendants.

The above named defendants, E. Hyde Rust, Receiver of The American Water Works Company of New Jersey, and the said The American Water Works Company of New Jersey by E. Hyde Rust, its Receiver, feeling themselves each aggrieved by the decree made and entered on the 24th day of June, 1895, in the above entitled cause, do each hereby severally appeal from said order and decree to the United States Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the assignment of errors which by these said defendants is filed herewith, and each of these said defendants pray that this their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated at Omaha, Nebraska, August 1st, 1895.

CHAS. OFFUTT,
Solicitor for said Defendants.

The foregoing claim of appeal is allowed.

Dated this August 27th, 1895.

JOHN A. RINER.
District Judge for the District of Wyoming, assigned to hold the Circuit Court in and for the District of Nebraska.

Upon the back of said Petition for Appeal appear endorsements in the words and figures following, to-wit:

No. 96 Doc. Q. In U. S. Circuit Court, District of Nebraska. Farmers Loan & Trust Co., Complainant, v. American Water Works Co. et al., Defendants. Petition on Appeal. Filed Aug. 27, 1895. E. D. Frank, Clerk. Chas. Offutt, Solicitor for Defendants.

401 Thereupon Afterwards, to-wit On the Twenty-seventh day of August 1895 the following proceedings were had and done in said case as appears of record on Folio 112, Journal "U" of said Court, to-wit:

ORDER ALLOWING APPEAL.

The Farmer's Loan & Trust Company

96 Q. vs.

The American Water Works Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and others,

This cause coming on to be heard on the petition of E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey) and The American Water Works Company (of New Jersey), praying an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, it is hereby ordered by the Court that the appeal be and is hereby allowed as prayed in said petition.

402 Thereupon afterwards, to-wit: on said 27th day of August, 1895, a Bond was filed in said case, which said Bond is in the words and figures following, to-wit:

Know all Men by these Presents, That we, E. Hyde Rust, Receiver of The American Water Works Company of New Jersey, and William A. Rust of Boston in the State of Massachusetts, are held and firmly bound unto The Farmer's Loan & Trust Company, and Ellis L. Bierbower and Alonzo B. Hunt, Receivers, in the full and just sum of One Thousand Dollars ($1,000.00) to be paid to the said The Farmer's Loan & Trust Company, and Ellis L. Bierbower and Alonzo B. Hunt, Receivers. heirs, executors, successors administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 21st day of August in the year of our Lord one thousand eight hundred and ninety Five.

Whereas, lately at the May term A. D. 1895, of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between The Farmer's Loan &

Trust Company plaintiff and The American Water Works Company, and E. Hyde Rust, Receiver of the American Water Works Company (of New Jersey) et al, defendant a decree was rendered against the said E. Hyde Rust, Receiver as aforesaid, and the said E. Hyde Rust, Receiver has obtained an Appeal of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The Farmer's Loan & Trust Company, Ellis L. Bierbower and Alonzo B. Hunt, Receivers, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said E. Hyde Rust, Receiver as aforesaid, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and Delivered in Presence of

E. HYDE RUST, [Seal]

BENJ. H. BRADLEY to both.

WM A. RUST. [Seal]

Approved by

JOHN A. RINER, Judge.

August 27th, 1895.

United States of America,
District of Massachusetts—ss.

I, the undersigned, United States Circuit Judge for the District of Massachusetts, do hereby certify that I have carefully examined the within bond and the surety thereto, and that said surety is good and sufficient.

In Witness Whereof, I have hereunto set my hand at Boston this 22nd day of August 1895.

De BARON B. COLT,
Circuit Judge.

No. 96 q. United States Circuit Court, District of Nebraska. Farmers Loan & Trust Co., Complainant, vs. American Water Works Co. et al., Defendants. Filed 27th day of August, 1895. E. D. Frank, Clerk.

403 The United States of America, To The Farmers' Loan & Trust Company, The American Water Works Company of Illinois and Alonzo B. Hunt, Temporary Receiver—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein E. Hyde Rust, Receiver of The American Water Works Company (of New Jersey), and The American Water Works Company (of New Jersey) are Appellants, and you are Appellees, to show cause, if any there be, why the judgment rendered against the said Appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, United States District Judge for the District of Wyoming, assigned to hold the Circuit Court of the United States for the District of Nebraska, this 27th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Seal United States Circuit Court District of Nebraska.

JOHN A. RINER,

United States District Judge, for the District of Wyoming, assigned to hold the Circuit Court for the District of Nebraska.

Due personal service of the above citation admitted this 29th day of August 1895.

JNO. L. WEBSTER,

Sol. for American Water Works Company of Illinois and A. B. Hunt Temporary Receiver.

I. M. WOOLWORTH,

Sol. for Farmer's Loan & Trust Co.

No. 96 q. United States Circuit Court, District of Nebraska. Farmers Loan and Trust Co. Complainant, vs. American Water Works Co. et al., Defendants. Citation. Filed Sept. 21st, 1895. E. D. Frank, Clerk.

404 United States of America,
District of Nebraska—ss.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States, for the District of Nebraska, do hereby certify that the foregoing folios from One to Four Hundred and Four inclusive, contain true and faithful transcripts from the pleadings, process and proceedings of record and on file in said Court, in the case of The Farmers' Loan & Trust Company, vs. The American Water Works Company, a corporation organ-

ized and existing under the laws of the State of Illinois; The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey; E. Hyde Rust as suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt, temporary Receiver of said Company, and that copies of Citations issued therein duly certified, have been lodged and remain in my said office as such Clerk.

Seal United States Circuit Court District of Nebraska.

Witness my hand and the seal of said Court, at Omaha, in said District, this 25th day of September, A. D. 1895.

ELMER D. FRANK, Clerk.

Filed Sep. 30, 1895. John D. Jordan, Clerk.

309 And on the seventh day of October A. D. 1895, an appearance of counsel for Appellants The American Water Works Company of Illinois, et al., was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
No. 715, December Term, 1895.

American Water Works Company, (of Illinois), et al., Appellants,
vs.
The Farmers Loan & Trust Co.

The Clerk will enter my appearance as Counsel for the Appellants.

JNO. L. WEBSTER.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 715. American Water Works Co. et al., appellants vs. The Farmers Loan & Trust Co. Appearance. Filed Oct. 7, 1895. John D. Jordan, Clerk. John L. Webster, Counsel for Appellants.

And on the seventh day of October A. D. 1895, an appearance for appellant, Thaddeus S. Clarkson, Receiver, was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 716, December Term, 1895.

Thaddeus S. Clarkson, Receiver &c., Appellant,
vs.
The Farmers Loan & Trust Co.

The Clerk will enter my appearance as counsel for the appellant.

JNO. L. WEBSTER.

310 Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 716. Thaddeus S. Clarkson, Receiver, &c., Appellant vs. The Farmers Loan & Trust Co. Appearance. Filed Oct. 7, 1895. John D. Jordan, Clerk. John L. Webster, Counsel for Appellant.

And on the seventh day of January A. D. 1896, an appearance of the Farmers Loan and Trust Company, appellee, was filed in the cause wherein American Water Works Company

of Illinois, et al., were appellants, which said appearance is in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
No. 715, December Term, 1895.

The American Water Works Company (of Illinois) et al., Appellants,

vs.

The Farmers Loan and Trust Company.

The Clerk will enter my appearance as counsel for the appellee.

J. M. WOOLWORTH,
DAVID McCLURE.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 715. American Water Works Co., (of Illinois) et al., Appellants, vs. Farmers Loan & Trust Co. Appearance. Filed Jan. 7, 1896. John D. Jordan, Clerk. J. M. Woolworth, David McClure, Counsel for Appellee.

And on the same day, to wit, the seventh day of January A. D. 1896, an appearance of the Farmers Loan & Trust Company, appellee, was filed in the cause wherein Clarkson, Receiver, was appellant, in the following words, to wit:

311 United States Circuit Court of Appeals, Eighth Circuit.

No. 716, December Term, 1895.

Thaddeus S. Clarkson, Receiver of the American Water Works Company, &c., Appellant,

vs.

The Farmers Loan and Trust Company.

The Clerk will enter my appearance as counsel for the appellee.

J. M. WOOLWORTH,
DAVID McCLURE.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1895. No. 716. Thaddeus S. Clarkson, Receiver &c., Appelant, vs. Farmers Loan & Trust Co. Appearance. Filed Jan. 7, 1896. John D. Jordan, Clerk. J. M. Woolworth, David McClure, Counsel for Appellee.

And on the seventh day of January A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, at the

December Term, 1895, thereof, is an entry in said causes, in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1895.

Tuesday, January 7, 1896.

The American Water Works Company (of Illinois) et al., Appellants,

No. 715. vs.

The Farmers Loan and Trust Company, Appellee,

and

Thaddeus S. Clarkson, Receiver of the American Water Works Company, a corporation of the State of Illinois, Appellant,

No. 716. vs.

The Farmers Loan and Trust Company, Appellee.

312 Appeals from the Circuit Court of the United States for the District of Nebraska.

These causes having been advanced and called for hearing this day, argument was commenced by Mr. John L. Webster in behalf of the appellants, continued by Mr. David McClure for the appellee, and the hour of adjournment having arrived before the conclusion thereof, further argument was postponed until to-morrow morning. On motion one hour additional time is granted to each side for the argument of these causes.

And on the eighth day of January A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, at the December Term, 1895, thereof, is an entry of submission of said causes in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1895.

Wednesday, January 8, 1896.

The American Water Works Company (of Illinois) et al., Appellants,

No. 715. vs.

The Farmers Loan & Trust Company, Appellee

and

Thaddeus S. Clarkson, Receiver of the American Water Works Company, a corporation of the State of Illinois, Appellant,

No. 716. vs.

The Farmers Loan & Trust Company, Appellee.

Appeals from the Circuit Court of the United States for the District of Nebraska.

These causes having been called this day for further hearing, argument was continued by Mr. David McClure and Mr.

J. M. Woolworth for the Appellee and concluded by Mr.
313 John L. Webster for the appellant. Thereupon these causes were submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

And on the sixteenth day of March A. D. 1896, an opinion of said Circuit Court of Appeals was filed in said causes in the following words, to wit:

314 United States Circuit Court of Appeals, Eighth Circuit.

No. 715. December Term, A. D. 1895.

Appeal from the Circuit Court of the United States for the District of Nebraska.

The American Water Works Company of Illinois, and the American Water Works Company of New Jersey, Appellants,

vs.

The Farmer's Loan and Trust Company, Appellee.

No. 716. December Term, A. D. 1895.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Thaddeus S. Clarkson, Receiver of The American Water Works Company, a corporation of the State of Illoinois, Appellant,

vs.

The Farmer's Loan and Trust Company, Appellee.

Mr. John L. Webster for the appellants.

Mr. J. M. Woolworth and Mr. David McClure (Mr. R. S. Hall was with them on brief) for the appellee.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

STATEMENT.

The suit out of which these appeals arise was brought by the Farmer's Loan & Trust Company, the appellee, to foreclose an original and a supplemental mortgage on a certain Water Works plant situated in the City of Omaha, Nebraska, which were given to secure the payment of an issue of negotiable bonds to the amount of four million dollars, that were executed by the American Water Works Company, a corporation of the State of Illinois. The action was brought originally against the appellants, The American Water Works Company, of Illinois, and against a corporation of the
315 same name, to wit: The American Water Works Company, a corporation organized under the laws of the

State of New Jersey. E. Hyde Rust, as suspended receiver of the American Water Works Company of New Jersey, and Alonzo B. Hunt, as temporary receiver of the same company, were also named as parties defendant to the original bill. The defendant companies filed a joint answer to the bill of complaint, and subsequently an amended answer, wherein they set up various defenses to the suit. After the taking of considerable testimony by both parties, a trial was had which resulted in a decree of foreclosure directing a sale of the mortgaged property for the satisfaction and payment of the mortgaged debt. From that decree the two defendant companies, to wit: The American Water Works Company of Illinois, and the American Water Works Company of New Jersey, have appealed.

During the pendency of the suit at bar, an action was commenced in the Circuit Court of Cook County, Illinois, against the appellant, The American Water Works Company of Illinois, to wind up the affairs of that company on the ground of its insolvency. In that proceeding Francis B. Peabody was appointed receiver of the property and effects of the insolvent corporation, and thereafter by an order made on May 2, 1895, by the Circuit Court of the United States for the District of Nebraska, Thaddeus S. Clarkson, the appellant, was appointed ancillary receiver of said company for the District of Nebraska. After the final hearing of the suit at bar to foreclose the aforesaid mortgages, and on the day that the final decree therein appears to have been entered, said Thaddeus S. Clarkson in his capacity as ancillary receiver of the American Water Works Company of Illinois, asked leave to file an answer to the bill of complaint, which application was, by the Circuit Court, refused. From the order thus made denying his application to file an answer to the bill of complaint, the receiver has also prosecuted an appeal. Both of said appeals are before this court for consideration upon the same record.

Thayer, J., after stating the case as above, delivered the opinion of the court.

The important questions which arise on these appeals will be best explained and understood by a succinct statement of the facts and circumstances that gave rise to the litigation. In the year 1880 the City of Omaha, being a city of the first class, was authorized by a general law of the State of Nebraska regulating the organization and defining the powers of cities of the first class, "To erect, construct, and maintain Water Works either within or without the corporate limits of the city, and to make all needful rules and regulations con-

cerning the use of water supplied by such Water Works, and to do all acts necessary for the construction, completion, management, and control of the same, including the appropriation of private property for the public use in the construction and operation of such Water Works; * * * and,* * *
316 to *contract with and procure individuals or corporations to construct and maintain Water Works on such terms and under such regulations as may be agreed on.*" Laws of Nebraska, 1879, pages 95 and 99. The power thus conferred upon the city was exercised by its Mayor and Council by an ordinance passed on June 11, 1880, which was subsequently amended, entitled: "An ordinance to authorize and procure the construction and maintenance of Water Works in the City of Omaha, State of Nebraska." The first section of this ordinance was as follows: "Sec. 1. Any person, company, corporation or association who shall erect, construct and maintain Water Works upon the principle of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described, and as more fully and at large appears in the report and Appendix Tables of J. D. Cook, Engineer, filed in the office of the City Clerk of the City of Omaha, on the 25th and 31st days of May, A. D. 1880, and as finally approved by the City Council of said city on the 8th of June, A. D. 1880, within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof for domestic, mechanical, public and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares, and public places of said city for the purpose of placing and repairing their mains, pipes and other fixtures, including fire-hydrants, during the time any such person, company, corporation or association, or their assigns, shall maintain and operate any such Water Works, and while constructing the same upon the terms and conditions hereinafter mentioned."

The succeeding sections of said ordinance specified the sources from which the water supply for the city should be drawn, the size and location of reservoirs to be erected, the capacity of the pumping machinery to be employed, the size of the water mains and pipes, the general location thereof, the number of fire-hydrants to be erected, the tariff of rates to be charged for supplying water both to public and private consumers, and many other details of construction and operation unnecessary to be mentioned. The 12th section of the ordinance provided, in substance, that proposals should be invited and received by the city for furnishing the city with water for the period of twenty-five years from the date of the

completion of the plant by means of a water works plant that was to be constructed and operated in conformity with the provisions of the ordinance. The final section of the ordinance reserved to the municipality the right to purchase the plant that might be thus constructed, at a valuation to be fixed by arbitration, at any time after the expiration of twenty years. In pursuance of the provisions of the aforesaid ordinance, a contract was entered into between the City of Omaha and one Sidney E. Locke, on July 20, 1880, whereby the latter person secured the right to construct and maintain Water Works, and to furnish water to the City of Omaha for public and private use for the term of twenty-five years from the completion of the works. On July 20, 1880, the aforesaid contract was assigned by Locke to the City Water Works Company of Omaha, a corporation of the State of Nebraska.

317 The latter company completed the works in accordance with the provisions of the contract, and the plant when completed was duly accepted by the city. On August 2, 1880, the City Water Works Company executed a mortgage on the Water Works plant, then in process of construction, to secure an issue of bonds to the amount of four hundred thousand dollars which are still outstanding.

On or about April 1, 1887, The American Water Works Company of Illinois, one of the appellants, purchased the plant now in controversy from the City Water Works Company of Omaha, and subsequently, on July 1, 1887, and on January 16, 1889, it executed the two mortgages or deeds of trust to the Farmer's Loan & Trust Company, as trustee, which it seeks to have foreclosed. These mortgages respectively contained, in substance, the following recitals, to wit: that the mortgagor company (The American Water Works Company of Illinois) was duly authorized to build, equip and operate Water Works for the purpose of supplying water to cities, towns and villages and other municipal corporations; that it had purchased from the City Water Works Company of Omaha, the Water Works plant and real estate connected therewith, by means of which the City of Omaha and its inhabitants were supplied with water for fire and other purposes, including the contract with the city under which the City Water Works Company was engaged in furnishing water to said city, and including also all contracts with private consumers; that by the terms of its purchase of said Water Works plant, it had agreed to assume the bonded debt of said City Water Works Company, and in addition to said bonded debt, to assume and pay all other indebtedness of said City Water Works Company; that the mortgagor Company deemed it essential and necessary to the successful maintenance and

operation of said works to make extensive improvements upon and additions to said Water Works plant, for the purpose of enabling it to comply with the increased demand made upon it for water, arising from the rapid growth of the City of Omaha; that it was vested with the power under its charter, of contracting debts and borrowing money, and that it had been authorized by a resolution duly passed by its Board of Directors on June 30, 1887, to issue bonds to the amount of four million dollars, and to secure the same by a mortgage on its Omaha property, and by pledging its income and resources for the payment thereof.

Said mortgages contained a further recital, to the effect that by virtue of the aforesaid resolution of the Board of Directors of the American Water Works Company of Illinois, the proceeds of the bonds authorized to be issued were to be appropriated and used as follows: $800,000 for the purpose of extending, enlarging and improving the Water Works plant of the City of Omaha that had been purchased; $1,700,000 for the purpose of paying the purchase price for said works and to extinguish the bonded and other indebtedness of the City Water Works Company that had been assumed by the purchasing company; and the residue, $1,500,000, for the purpose of enlarging and improving the works in future, as occasion might require.

Contemporaneously with the execution and delivery of the aforesaid mortgage or deed of trust dated July 1, 1887,
318 and prior to the execution of the supplemental mortgage dated January 16, 1889, The American Water Works Company of Illinois executed and deposited with the appellee, The Farmer's Loan & Trust Company, four thousand negotiable bonds amounting in the aggregate to four million dollars. By the terms of the mortgage given to secure the same, bonds to the amount of $1,600,000 were to be delivered forthwith by the Farmer's Loan & Trust Company to any person or persons who presented to it written orders for the delivery of bonds signed by the President and Secretary of the mortgagor company. Bonds to the amount of $400,000 were to be retained by said Trust Company for the purpose of retiring the outstanding bonds to the same amount, that had been executed by the City Water Works Company of Omaha. The residue of the bonds were to be held in trust and delivered from time to time by said Trust Company under certain terms and conditions specified in said mortgage, which for present purposes need not be stated. It will suffice to say that the Circuit Court found and decreed that the Farmer's Loan & Trust Company had duly certified and put in cir-

culation, in accordance with the provisions of the mortgage, bonds to the amount of $3,600,000, and it was stipulated by the parties in the progress of the trial that "a large part of the bonds in controversy had been negotiated and sold by C. H. Venner," who was a director of the American Water Works Company and was the chief manager of its financial affairs. This stipulation must be held to imply that the bulk of the entire issue of bonds, all of them perhaps except bonds to the amount of $400,000, that are still held by the Trust Company to retire the outstanding bonds of the City Water Works Company of Omaha, were sold for value in the open market, to purchasers who had no notice of any of the facts attending the issuance of the bonds, except such as were disclosed by the recitals contained in the mortgages securing the same.

The American Water Works Company of Illinois took possession of the Water Works now in controversy shortly after it acquired the same by purchase from the City Water Works Company of Omaha, to wit: in April, 1887, and continued to operate the works with the full knowledge and consent of the City of Omaha until about the 24th day of April, 1891. In the meantime the City of Omaha made payments to the vendee company for water supplied to the city for fire and hydrant purposes, and made such payments at the time and at the rate agreed upon in the original contract between itself and the said Sidney E. Locke; and in all other respects it appears to have recognized the American Water Works Company of Illinois as the legitimate owner and assignee of the Water Works, and of all rights, privileges and franchises incident thereto that were originally acquired by said Locke by virtue of his contract with the City of Omaha. In the meantime also, The American Water Works Company of Illinois paid the interest on such of its bonds dated July 1, 1887, as had been certified and put into circulation by the Farmer's Loan & Trust Company pursuant to the provisions of the aforesaid mortgage or deed of trust.

On April 24, 1891, The American Water Works Company sold and conveyed its entire Water Works plant situ-
319 ated in the City of Omaha, and all the real estate, rights and privileges connected therewith, to its namesake, The American Water Works Company of New Jersey, which last named company thereafter operated the works and supplied water to the City of Omaha at the rate agreed upon in the contract between the city and the said Sidney E. Locke; it also paid the interest on the bonds now in controversy as they

matured until January 1, 1892. The deed by which the property was thus conveyed by the Illinois Company to the New Jersey Company, described the outstanding incumbrances existing thereon, to wit: the aforesaid incumbrances for $400,000 and $4,000,000 respectively, and expressly declared that the property was conveyed to the grantee company "*subject to said incumbrances.*"

In view of the foregoing facts, The American Water Works Company of Illinois and the American Water Works Company of New Jersey, which for convenience will be hereafter termed respectively the Illinois Company and the New Jersey Company, now contend that the mortgages sought to be foreclosed are invalid for want of authority on the part of the Illinois Company to execute the same. This was the principal, if not the sole defense pleaded in the several answers to the bill of complaint. In other words, while it was recited, in substance, in the mortgages now sought to be foreclosed, as heretofore shown, that they were executed by the Illinois Company for the express purpose, among others, of enabling it to obtain money by the sale of its bonds to pay for the mortgaged property, and to alter, extend and improve the same and render it more valuable and serviceable, it is now claimed by the mortgagor company, and by its successor in interest, the New Jersey Company, that the mortgages were and are void; that the New Jersey Company is entitled to hold the mortgaged property, discharged from the lien thereof, and that the defense of *ultra vires* may be successfully pleaded both by it and by the Illinois Company, in a suit to foreclose the mortgages, without paying or offering to pay the whole or any part of the outstanding bonds thereby secured. The defense thus interposed does not commend itself to the favorable consideration of a court of equity, and unless it is clearly sustained by authority which this court is bound to recognize and follow, it should be overruled. A number of authorities have been invoked by counsel for the appellants in support of the defense which is interposed, but in our judgment, none of them, when fairly applied to the case in hand, are sufficient to justify a decision that the mortgages are void, and for that reason are not enforceable against the defendant companies. The New Jersey Company, we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois Company, by virtue of the well-established rule that a purchaser of property who accepts a conveyance thereof which describes incumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances. One who thus buys property has no right to

challenge the validity of a mortgage lien existing thereon at the date of his purchase, which his grantor by the terms
320 of his conveyance did not see fit to challenge, but recognized in the most formal manner by declaring that he conveyed the property subject to the existing lien. Whether such mortgage is valid or otherwise is no concern of the purchaser, for in contemplation of law he only acquires an equity of redemption in the property conveyed to him, that is to say, a right to discharge the mortgage debt, and it would be a breach of good faith, having purchased this right and nothing more, to deny the validity of the incumbrance and seek to avoid the payment thereof on that ground. As between the grantor and grantee in a conveyance made subject to an existing mortgage, the amount of the incumbrance should be regarded as a part of the purchase price left unpaid at the date of the conveyance which the grantee undertakes to pay. At all events, he impliedly agrees not to challenge the validity of the incumbrance. The authorities to this point are amply sufficient, in our opinion, to preclude the New Jersey Company from defending against the foreclosure on the ground that the mortgages are invalid. *Freeman* v. *Auld*, 44 N. Y., 50; *Johnson* v. *Thompson*, 129 Mass., 398; *Ritter* v. *Phillips, et al.*, 53 N. Y., 586; *DeWolf* v. *Johnson*, 10 Wheat., 367; *Calkins* v. *Copley*, 29 Minn., 471; *Shufelt* v. *Shufelt*, 9 Paige, 137, 145; Jones on Mortgages (4th Ed.) Secs. 744, 1491, and cases there cited.

It is also apparent, we think, that the Illinois Company has no such present interest in the mortgaged property as should entitle it to resist a foreclosure sale of the property for the purpose of paying its outstanding bonds. Long before this suit was brought, the Illinois Company had sold its plant situated in the City of Omaha, and had made a conveyance thereof to its grantee, subject to the mortgages thereon which are now in controversy. So far as the present record shows, it entered into no engagement with its grantee to pay any portion of the mortgage debt, but by the form of its deed devolved that duty upon the grantee and expressly declined to assume any such obligation. It would seem, therefore, that a sale of the mortgaged property for the payment of the mortgage debt will inure to the advantage of the mortgagor company, rather than to its disadvantage, for whether the mortgages by it executed did or did not create a valid lien on the property therein described and conveyed, it certainly cannot be denied that the mortgagor is liable on the outstanding bonds, by the sale of which it has realized a large sum of money which it has appropriated to its own use and benefit. It is clearly liable on its bonds to the purchasers thereof, even

though it had no power to execute the mortgages, and it will be relieved of this liability to the extent that such bonds are extinguished and paid by the proceeds of the sale of the mortgaged property. For this reason, that is to say, because it had parted with all interest in the mortgaged property, and is not bound by the terms of any contract or covenant to protect its grantee from a foreclosure sale, and in contemplation of law will be benefited by such sale, it should not be heard to allege as against the bondholders, that it executed the mortgages without authority.

On the argument of the case it was suggested that the Illinois Company was without power under its charter to
321 execute mortgages on any real property that it might own or acquire; and with much force it was contended that the property covered by the mortgages now in question was of such a character, being a Water Works plant designed for public use and convenience, that it was not susceptible of being sold, assigned, or mortgaged without express authority derived under the laws of the State of Nebraska where the property is located. The first of these contentions is clearly untenable. The American Water Works Company of Illinois was organized under a general incorporation law of the State of Illinois, the first section of which provides: "That corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." The fifth section of the same act, which enumerates the powers that corporations formed thereunder may exercise, provides among other things that: "They may borrow money at legal rates of interest and pledge their property, both real and personal, to secure the payment thereof; and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." Rev. Stat. of Illinois, Cothran's Annotated Ed., ch. 32, Secs. 1 and 5. The powers thus conferred on the Illinois Company by the laws of Illinois, it carried with it into the State of Nebraska, and was privileged to there exercise, unless it was prohibited from so doing by the provisions of some local law or the public policy of that State. *Covell* v. *Springs Co.*, 100 U. S. 55, 59; *Female Academy* v. *Sullivan et al.*, 116 Ill., 375. And no law of the State of Nebraska has been cited which in our judgment deprived the Illinois Company of its right to exercise within the State of Nebraska its charter power to mortgage real estate by it owned and there situated.

With respect to the second contention of counsel above stated, it is sufficient to say that the charter power of the

City of Omaha heretofore quoted authorized it: "to contract with and procure individuals or corporations to construct and maintain Water Works, *on such terms and under such regulations as may be agreed on.*" Acting under that power, it seems evident that the city was authorized to agree with anyone who undertook to construct and maintain Water Works for its benefit, that he should have the right to assign his contract or to sell or mortgage the plant, and that the assignee or purchaser should succeed to all the rights and privileges of the original contractor. The legislature saw fit to invest the city with full power and discretion to determine whether the person or corporation with whom it might enter into an agreement for the construction and maintenance of Water Works, should be permitted to mortgage the plant and franchises incident thereto, or whether he should be denied that privilege. It was probably thought that the person or company who might undertake to construct an extensive system of Water Works for a growing city like the City of Omaha, would find it necessary to borrow money to complete the works, and to secure the loan by a mortgage on the plant and franchises, and that the city might deem it advisable to confer that privilege. It accordingly left the city at full liberty to enter into such an agreement with the contractor and to grant
322 such rights and privileges as it deemed advisable. Inasmuch, then, as the municipality was authorized by the general laws of the State to permit or to ratify the execution of an incumbrance covering the Water Works property and franchises, if the City of Omaha does not see fit to challenge the right of the Illinois Company to execute the mortgages now in controversy, it is not apparent that the mortgagor company has the right to raise that question. The City of Omaha has not hitherto questioned the validity of the incumbrances, and it is not a party to the suit, nor in anywise concerned in the present controversy. Moreover, it has hitherto, for a long period of time recognized the assignability of the contract under and by virtue of which the Water Works plant was constructed, by paying hydrant rentals to the successive assignees according to the provisions of the contract, and by permitting them as assignees, to exercise the franchises thereby granted to the original contractor. For this reason we do not deem it necessary or material, on the present occasion, to decide whether by the terms of the contract between the City of Omaha and Sidney E. Locke, or whether by the provisions of the ordinance on which that contract was based, the city did in fact expressly authorize the execution of an incumbrance covering the Water Works plant that was to be constructed. That is a question we think which on the

present record the mortgagor company is not privileged to raise, and should not be permitted to raise.

Besides the points already discussed, the appellants indulge in some criticism of various provisions of the decree. It is claimed, in substance, that the decree of foreclosure and sale, as heretofore entered, permits the appellee, The Farmer's Loan & Trust Company, in case it becomes a purchaser at the foreclosure sale, to pay the amount of its bid, in bonds at their par value, without reference to the price bid for the property, and that the decree also denies the right of other purchasers to answer their bids in bonds. If such is the proper construction of the provisions of the decree, and some paragraphs thereof doubtless give color to that construction, it should be corrected before a sale takes place. Bonds should not be received from any purchaser in payment of his bid, except for such proportion of the sum bid as the purchaser, on a distribution of the purchase money, shall be entitled to receive out of the purchase price, on account of the bonds by him held and tendered in payment of his bid. In other words, bonds should not be received at par in payment of a bid unless the purchase price is adequate to pay the par value of all outstanding bonds. Moreover, the right to answer a bid in bonds should not be limited to a particular bondholder, but should be extended to all bondholders on the same terms.

Counsel for the appellee have conceded that the provision in the decree requiring so much of the purchase price as is not paid in bonds to be paid "in gold coin of the United States of the present standard of fineness" may result in some inconvenience and hardship to bidders, and that it is an unnecessary provision. As we understand, they consent that this clause may be expunged from the decree so as to permit
323 payment to be made in whatever kind of money is recognized as a legal tender by the laws of the United States.

We also observe, although the point was not made in the argument, that the provisions in the existing decree relative to the place of sale and mode of advertisement are not such as will satisfy the requirements of the Act of Congress in that behalf, enacted on March 3, 1893, 27 Stat., 751, ch. 225.

In view of the aforesaid defects and uncertainties in the existing decree, it will be modified by this Court without remanding the case by adding thereto the following provisions, to wit:

"All sums of money required to be paid under the provisions of this decree shall be paid in legal tender money of the United States; but the plaintiff or any other bidder at the

sale herein provided for may answer his bid with the bonds or coupons heretofore mentioned which shall be received in payment of such bid for an amount equal to the sum of money which the holder of said bonds or coupons so tendered would be entitled to receive on account thereof on the distribution of the purchase price bid at such sale. Said sale shall be made at the Court House of the County of Douglas, in the State of Nebraska, that being the county in which the property to be sold is situated. Notice of such sale shall be published once a week for four successive weeks in the "Omaha Daily World-Herald," and the "Omaha Daily Bee," said newspapers being printed, regularly issued and published, and having a general circulation in said County of Douglas, State of Nebraska, and also in some newspaper printed, published and regularly issued, and having a general circulation in the City of New York. All provisions of the original decree to which this paragraph is amendatory which are in conflict with any of the provisions of this paragraph are hereby cancelled and annulled, but in all other respects said decree as entered by said Circuit Court of the United States for the District of Nebraska on June 24, 1895, shall be and remain firm and effectual."

Touching the appeal taken by Thaddeus S. Clarkson, as ancillary receiver of the Illinois Company, it is only necessary to say that his application to file an answer to the bill of complaint was made too late, and was properly denied by the Circuit Court for that reason, as well as for the reason that an answer setting up all the defenses which he proposed to make had already been filed by the company which he represented. The Circuit Court was justified in denying an application to file an answer which was not made until all the testimony had been taken and the cause had been heard and submitted.

The decree of the Circuit Court for the District of Nebraska as herein modified by the aforesaid provision ordered to be inserted therein, is hereby affirmed, each party to pay its own costs in this Court, except the costs incurred on the appeal taken by Thaddeus S. Clarkson, Receiver, all of which costs will be taxed against said last named appellant.

Filed March 16, 1896.

324 And on the sixteenth day of March A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, at the December Term, 1895, thereof, is a decree in the cause wherein The American Water Works Company of Illinois

was Appellant, which said decree is in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1895.

Monday, March 16, 1896.

The American Water Works Company of Illinois and The American Water Works Company of New Jersey and Alonzo B. Hunt, Temporary Receiver of The American Water Works Company of New Jersey, Appellants

No. 715. vs.

The Farmers Loan and Trust Company, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the Circuit Court of the United States for the District of Nebraska, in this cause, be, and the same is hereby modified by adding thereto the following paragraph, to wit:

All sums of money required to be paid under the provisions of this decree shall be paid in legal tender money of the United States; but the plaintiff or any other bidder at the sale herein provided for may answer his bid with the bonds or coupons heretofore mentioned which shall be received in payment of such bid for an amount equal to the sum of money which the holder of said bonds or coupons so tendered would be entitled to receive on account thereof on the distribution of the purchase price bid at such sale. Said sale shall be made at the Court House of the County of Douglas, in the State of Nebraska, that being the county in which the property to be
325 sold is situated. Notice of such sale shall be published once a week for four successive weeks in the "Omaha Daily World Herald," and the "Omaha Daily Bee," said newspapers being printed, regularly issued and published, and having a general circulation in said county of Douglas, State of Nebraska, and also in some newspaper printed, published and regularly issued, and having a general circulation in the City of New York. All provisions of the original decree to which this paragraph is amendatory which are in conflict with any of the provisions of this paragraph are hereby cancelled and annulled, but in all other respects said decree as entered by said Circuit

Court of the United States for the District of Nebraska on June 24, 1895, shall be and remain firm and effectual.

And that said decree as thus modified be and the same is hereby affirmed.

It is further ordered that each party pay the costs incurred by it in this Court, and that the mandate to the said Circuit Court be and the same is hereby directed to be issued at the expiration of ten days from this date.

March 16, 1896.

And on the sixteenth day of March A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, at the December Term, 1895, thereof, is a decree in the cause wherein Clarkson, Receiver, was Appellant, which said decree is in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895.

Monday, March 16, 1896.

Thaddeus S. Clarkson, Receiver of The American Water Works Company, a corporation of the State of Illinois, Appellant,

No. 716. vs.

The Farmers Loan and Trust Company, Appellee.

326 Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs; and that The Farmers Loan and Trust Company have and recover against Thaddeus S. Clarkson, receiver of the American Water Works Company a corporation of the State of Illinois the sum of twenty dollars for its costs herein and have execution therefor.

March 16, 1896.

And on the sixth day of January A. D. 1896, a motion to dismiss the appeal of E. Hyde Rust, Receiver, et al., was filed in

the cause wherein E. Hyde Rust, et al., were Appellants, which said motion is in the following words, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

E. Hyde Rust, Receiver, et al.,
No. 717. vs.
Farmers Loan & Trust Co., et al.

MOTION TO DISMISS APPEAL.

Come now the said Appellants by their solicitor Chas. Offutt and voluntarily dismiss their appeal herein and request the court to enter an order to that effect. And so the said Appellants will ever pray.

CHAS. OFFUTT,
Solicitor for Appellants.

St. Louis, Mo., January 6, 1896.

Indorsed: No. 717. E. Hyde Rust, Rec. &c., v. Farmers Loan & Trust Co., et al. Dismissal of Appeal. Filed Jan. 6, 1896. John D. Jordan, Clerk. Chas. Offutt, Solicitor for Appellant.

327 And on the sixth day of January A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals, at the December Term, 1895, thereof, is a decree dismissing the appeal of said E. Hyde Rust, etc., which said decree is in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1895.

Monday, January 6, 1896.

E. Hyde Rust, Receiver of the American Water Works Company of New Jersey and The American Water Works Company of New Jersey, Appellants,
No. 717. vs.
The Farmers Loan and Trust Company, The American Water Works Company of Illinois, and Alonzo B. Hunt, Temporary Receiver, Appellees.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called for hearing, and a motion by counsel for the Appellants, Mr. Charles Offutt, to dismiss this cause haing been filed, therefore, in pursuance of said motion, it is now here ordered, adjudged and decreed by this Court, that the appeal from said Circuit Court be, and the same is hereby dismissed without costs to the Appellees in this Court.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court for proceedings therein according to law and justice.

It is also further ordered that Counsel for Appellants have leave to withdraw the briefs filed by him in this cause.

January 6, 1896.

328 United States Circuit Court of Appeals, Eighth Circuit.

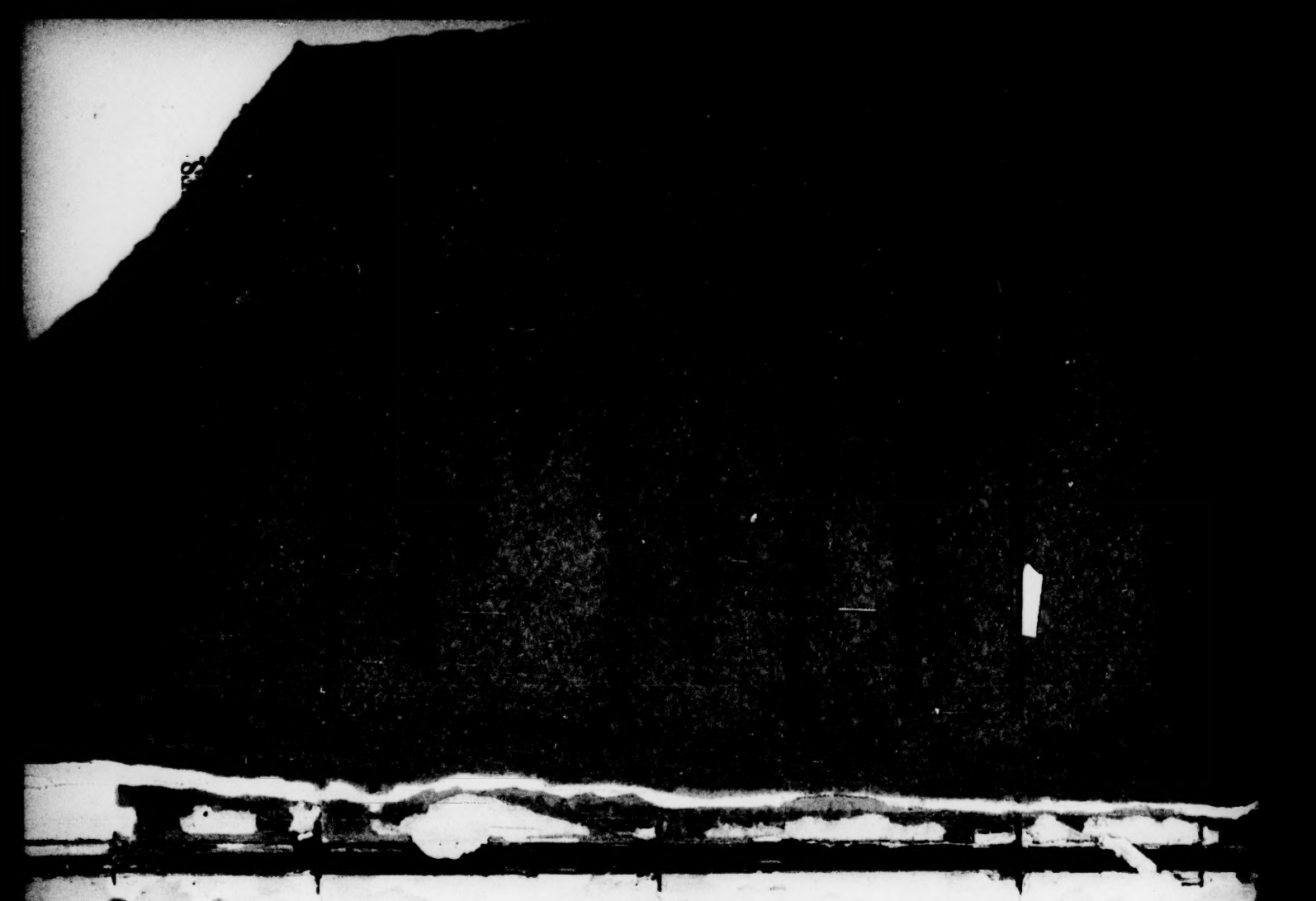
I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing pages numbered from one to 327 inclusive, contain a full, true and complete copy of the transcript of record from the Circuit Court of the United States for the District of Nebraska, and of all the pleadings and proceedings including the opinion of said Circuit Court of Appeals in the causes wherein The American Water Works Company of Illinois, et al., were Appellants and The Farmers Loan and Trust Company, Appellee, No. 715, December Term, 1895, and wherein Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, was Appellant, and the Farmers Loan and Trust Company, Appellee, No. 716, December Term, 1895, as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that I have included within the above named paging, full, true and complete copies of the motion to dismiss the appeal and of the decree entered thereon in the cause wherein E. Hyde Rust, receiver of the American Water Works Company of New Jersey, et al., were Appellants and The Farmers Loan and Trust Company, et al., Appellees, No. 717, December Term, 1895.

I further certify that a mandate was issued and sent to the Circuit Court of the United States for the District of Nebraska, on the second day of April A. D. 1896, in each of the causes wherein The American Water Works Company, et al., were Appellants No. 715, and Thaddeus S. Clarkson, Receiver, etc., was Appellant, No. 716, December Term, 1895, and that on the seventh day of March A. D. 1896, a mandate was issued and sent to the said Circuit Court of the United States for the District of Nebraska, in the cause wherein E. Hyde Rust,

329 Receiver, et al., were Appellants, No. 717, December Term, 1895.

Seal of the United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of St. Louis, Missouri, in the Eighth Circuit, this 23rd day of April A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals Eighth Circuit.